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No. 89-354

Supreme Court, U.S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1989

THE REV. RALPH BROWN, Personal Representative
of the ESTATE OF MATTHEW SWAN, Deceased,
Petitioner,

VS.

JEANNE LAITNER, THE ESTATE OF JUNE AHEARN,
Deceased, and the FIRST CHURCH OF CHRIST,
Scientist, Boston, Massachusetts (The Mother
Church), a foreign corporation, Jointly and Severally,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER THE PETITION WAS FILED OUT OF TIME.

WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT (1) UNDER MICHIGAN LAW THERE IS NO COMMON LAW ACTION IN NEGLIGENCE ON THE FACTS OF THIS CASE, (2) MICHIGAN PUBLIC POLICY MILITATES AGAINST PROVIDING A CAUSE OF ACTION BASED ON GOOD FAITH SPIRITUAL HEALING PRACTICES AND (3) ON THE FACTS OF THIS CASE, THE FIRST AMENDMENT PROHIBITS AN ACTION IN "ORDINARY NEGLIGENCE."

LIST OF PARTIES AND RULE 28.1 LIST

All of the parties are listed in the caption. Respondent June Ahearn died in June, 1989. There are no entities required to be listed pursuant to Rule 28.1.

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THE HISTORY OF THE

1790

The history of the city of London, from its first settlement to the present time, is a subject of great interest and importance. It is a subject which has attracted the attention of many of the most distinguished writers of the age, and which has been the subject of many of the most valuable works of history and antiquity. The history of London is a subject which is of great interest to all who are interested in the history of the British Empire, and who wish to know the origin and growth of this great city.

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

This Court lacks jurisdiction because the Petition was filed out of time. As is explained below, Petitioner filed a motion for reconsideration, not a motion for rehearing, in the Michigan

Supreme Court, which motion does not toll the time for filing a petition for certiorari.

STATUTES AND COURT RULES INVOLVED

In addition to the First Amendment to the United States Constitution cited by Petitioner, the following statutes relate to this case:

The Michigan Medical Practice Act in effect at the time of the events at issue, Mich. Comp. Laws 338.1817 [repealed by 1978 PA 368; see now Mich. Comp. Laws 333.1617(d)], provides:

This act or rules promulgated pursuant thereto do not apply to a person who, in good faith, ministers to the sick or suffering by spiritual means alone, through prayer, in the exercise of a religious freedom, if he does not use or prescribe drugs, medicine or surgery or assume the title of, or hold himself out to be, a physician or surgeon.

Section 14 of the Michigan Child Protection Law, Mich. Comp. Laws 722.634, provides:

A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect.

The Michigan court rule under which summary judgment was granted below, as in effect at the time of the trial court's ruling, was Mich. Gen. Ct. Rule 117.2(3), which provided:

.2 Grounds. The motion for summary judgment shall state that the moving party is entitled to judgment in his favor because of any 1 of the following grounds:

* * *

- (3) that except as to the amount of damages there is no genuine issues as to any material fact, and the moving party is therefore entitled to judgment as a matter of law.

The Michigan court rules relating to reconsideration and rehearing, as in effect at the time of Petitioner's Motion for Reconsideration, Mich. Ct. Rule 7.313(D) and (E) provide as follows:

(D) Motion for Rehearing.

- (1) To move for rehearing, a party must file within 21 days after the opinion was filed
- (2) Unless otherwise ordered by the Court, timely filing of a motion postpones issuance of the Court's judgment order until the motion is denied by the Court or, if granted, until at least 21 days after the filing of the Court's opinion on rehearing.

* * *

(E) Motion for Reconsideration. To move for reconsideration of a Court order, a party must file the items required by subrule (A) within 21 days after the certification of the order. The clerk shall refuse to accept for filing any motion for reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.

This Court's Rule 20.4 provides as follows:

The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the writ of certiorari for all parties

(whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

INTRODUCTION

Respondents will argue in this Brief in Opposition that the Petition is jurisdictionally out of time, that the decision below rests on an adequate and independent state ground, that there is no conflict among the lower courts and that the courts below ruled correctly.

Contrary to the suggestion in Petitioner's Question Presented and Conclusion sections, this case does not present the question whether the First Amendment raises an absolute bar to any tort action against persons who claim religious motivation. All of the "actions" complained of in this case were statements of sincerely-held religious belief. In order to understand the rulings of the lower courts, a full understanding of the facts and the proceedings in those courts is necessary.

COUNTER-STATEMENT OF THE CASE

I

THE FACTS

This is a civil action for money damages on account of the illness and death of fifteen month old Matthew Swan. Matthew's parents, both of whom hold Ph.Ds, were at the time of his illness life-long members of the Christian Science Church who believed that Matthew could be healed through prayer alone and not by medicine in conjunction with prayer. When Matthew became ill, his parents called on Christian Science practitioners and asked them to pray for Matthew in accordance with their faith. The parents asked for and received only Christian Science prayer. It

was stipulated by the plaintiffs¹ on the record below that the practitioners acted in consonance with their sincerely-held religious beliefs and that all of the statements at issue were statements of sincerely-held religious belief. Tragically, Matthew died. The parents later left the Christian Science Church, named a personal representative for Matthew's estate and, with the personal representative, brought an action in negligence and misrepresentation against Respondents the First Church of Christ, Scientist (the "Church") and practitioners Laitner and Ahearn.

The statement of facts in the Petition is seriously incomplete. Respondents refer the Court to the statement of facts in the opinion of the Michigan Court of Appeals, which is found in Appendix D to the Petition at App. 28.

II

THE PROCEEDINGS BELOW

A. The History Of The Litigation And The Posture Of The Case Prior To The Trial Court's Summary Judgment Ruling.

In the Complaint, plaintiffs alleged that the practitioners failed to follow what plaintiffs referred to as the rules and regulations of the Church, and claimed that certain misrepresentations were made about the Christian Science "treatment" offered by the practitioners.

Before any discovery was taken, Respondents filed motions to dismiss and for summary judgment, on First Amendment and other grounds.

¹The depositions of Rita and Douglas Swan show that they initiated this litigation and appointed one of their lawyers as personal representative of the child's estate. The Swans have withdrawn from the litigation, leaving only their designated personal representative as the Petitioner. References herein to "plaintiffs" refer to the Swans and the child's estate. References to the "Petitioner" refer to the estate alone.

By opinions dated September 24, 1980, the trial court dismissed plaintiffs' allegations of negligence against the practitioners for failure to follow what plaintiffs referred to as the "rules and regulations" of the Church, and held that certain alleged misrepresentations were statements of religious belief and church doctrine and, therefore, could not be the basis for a claim. Although the trial court concluded that, on their face, certain allegations made by plaintiffs may be within the realm of issues that a court can adjudicate, it noted that much of the proof proffered at trial might prove inadmissible because its admission would either involve the jury in religious matters or require the jury to determine the truth or falsity of religious doctrine. These 1980 rulings were not appealed when issued and are not before this Court.

B. Discovery, Mediation And Related Proceedings.

Extensive discovery, including about 32 different days of depositions, was taken over more than a year. The case was mediated and valued at "0" dollars.²

C. The Posture Of The Case On The Eve Of Trial.

As it stood in September, 1983, with discovery complete, the case involved a claim that the Church and the two practitioners (as agents of the Church) misrepresented their ability to properly minister to Matthew and were negligent in ministering to Matthew. The essence of plaintiffs' misrepresentation claim was that the Church and the practitioners could not truthfully represent themselves as able to treat problems involving the health of a child because they were not trained and educated in communicable diseases and physical and medical treatment. The essence of plaintiffs' negligence claim was that Respondents failed to con-

²Defendants cross-appealed as of right from the order setting aside judgment on the mediation award. The Court of Appeals did not reach the cross-appeal. If this Court were to grant certiorari and reverse, the Court of Appeals would have to consider the cross-appeal.

sult a doctor or health officials, or otherwise involve themselves with or obtain physical or medical treatment for Matthew which, plaintiffs claimed, a reasonable, prudent person would have done under the circumstances. Plaintiffs also claimed that the practitioners misdiagnosed Matthew's illness.

The case was set for trial on September 6, 1983. Both sides filed trial briefs. Respondents also filed several motions, including a motion for complete summary judgment under Mich. Gen. Ct. Rule 1963, 117.2(3) (no genuine issue of material fact).

D. The Trial Court's Decisions On September 6 and 7, 1983.

On the day of trial, the trial court chose to deal first with Respondents' motion for summary judgment, which raised the issues which had been reserved until after the facts of the case had been developed. During a two-day hearing, the transcript of which is in the Appendix hereto at page 1a, the trial court sought to determine what relevant material facts were at issue.

First, the trial court established the rules of law that would govern the case.³ It did so by making a series of rulings through, in effect, a stipulation of the parties. The court asked counsel whether the following principles correctly state the law:

1. A statement of a sincerely-held religious belief cannot be the basis for a cause of action for misrepresentation. Tr. Sept 6, pp 6-11; Appendix, pp 9a-12a, 50a-51a.
2. If the resolution of the Plaintiff's claim requires the Court to hear evidence with respect to what church doctrines or principles are, and what such church doctrines or principles required the defendants to do, then the Court is precluded

³As the Court put it: "The first thing I want to do is to discuss certain issues of law which I think are central to the case . . . I am, right now, searching for those neutral principles of law that I think I have to apply in this case and that any judge would have to apply in any similar case." Tr. Sept. 6, p 6.

from hearing the claim. *Id.*, pp 25-28 and 67; Appendix, pp 22a-24a.

In each instance, the attorneys for both parties agreed with the court.

The trial court determined that the issue was, "Is there any evidence that can be afforded to create a factual question on any of the causes of action?" *Id.* p 28; Appendix p 24a. The trial court stated that Respondents had presented evidence, as a part of their motion, that all of the statements made by Respondents were statements of sincerely-held religious beliefs and, therefore, could not constitute actionable misrepresentations, because to determine whether the statements were true or false would require a determination as to whether a religious belief was true or false. Because Respondents had satisfied their burden as the moving party, the trial court held that under GCR 117.2(3), the burden was now upon plaintiffs to come forward and show what factual dispute existed in this regard. Tr. Sept. 6, pp 48, 90; Appendix pp 38a, 66a-67a.

The trial court then had plaintiffs prepare a pleading listing each and every allegation of negligence and misrepresentation on which plaintiffs based their claim.⁴ This pleading was produced by plaintiffs' counsel at the beginning of the afternoon session on September 6, 1983, and is attached to and made a part of the court's Order granting summary judgment.⁵

The first allegation listed by plaintiffs occupied the trial court and the parties for the longest time. Also, the trial court applied

⁴The Court asked the plaintiffs' attorney: "Will you agree that the pleadings you have just filed would — entitled "ALLEGATIONS OF NEGLIGENCE AND MISREPRESENTATION" — include everything that you intend to try to get to a jury on?" and plaintiffs' attorney replied, "yes, your Honor . . ." Tr. Sept. 6, p 39; Appendix pp. 31a-32a.

⁵The reprinting of the trial court's order in Petitioner's Appendix is incomplete because it fails to include this attachment. The complete order is reprinted in the Appendix to this Opposition at 124a.

the reasoning developed in its first ruling to the other allegations. The first allegation was that Respondents were negligent, "In failing to frequently visit Matthew." Respondents asserted that to determine whether such conduct was negligent was inextricably bound up with the proper conduct of Christian Science healing, which could only be determined from Christian Science doctrine. The following colloquy ensued between the trial court and counsel for the plaintiffs:

THE COURT: What is the evidence that you are going to offer to create a factual question that they assumed a duty to heal him?

MR. CHRISTENSEN [Plaintiffs' attorney]: Okay. There will be evidence of representations of both individual practitioners . . .

THE COURT: You are going to have to tell me what the representations are.

MR. CHRISTENSEN: Okay; that "Matthew is being healed," or that, "I will take care of it. I will heal this person."

THE COURT: The next question is: What evidence are you going to offer that that was not a statement of a sincerely-held religious belief?

MR. CHRISTENSEN: I am going to offer that that statement was made. I submit, your Honor, that that statement having been made, that statement having been presented, that job having been accepted has its secular implications and its secular consequences. It cannot help that.

THE COURT: That is not going to be enough for me. You are going to have to give me some evidence concerning state of mind or whatever else you think is relevant to making a determination of whether a statement is a statement of a sincerely-held religious belief. Just to say that "We are going to put the statement in evidence and let the jury decide" is not enough, I don't think.

Tr. Sept. 6, pp 43-44; Appendix pp 34a-35a.

Although there were hours of colloquy over a two-day period, the above is the essence of what plaintiffs presented to the trial court: that because these Christian Science practitioners undertook to pray for Matthew Swan and because Matthew died, plaintiffs should be able to bring a civil action regardless of the religious nature of the services rendered. Indeed, plaintiffs' attorney could not explain to the court what admissible evidence he was prepared to offer to create a factual issue as to whether these claims called into question nothing more than Respondents' sincerely-held religious beliefs. Finally, on the second day of the hearing, plaintiffs' counsel conceded that he had no evidence to rebut that offered by Respondents that all of the statements (*i.e.*, all of the alleged misrepresentations) at issue were statements of the sincerely-held religious beliefs of the Respondents:

MR. CHRISTENSEN: ... If you look at this from the upside-down perspective of Christian Science, I'm going to lose every time. I'm not going to be able to tell you that Christian Scientists don't look at the world in a most convoluted form, because they do.

* * *

[W]hat we're asking this Court to do is, if the Court indeed finds that this is an expression of religious belief, then minimally to cut out a small exception for innocent children. ... *I can't tell you that they don't sincerely believe those things*

THE COURT: I'm not asking you to tell me to believe them, but I'm asking you to give me some evidence from which a fact-finder can conclude that [they don't sincerely believe those things].

MR. CHRISTENSEN: And I'm saying, Judge, that I can't make these Christian Scientists admit that they're wrong, I guess.

Tr. Sept. 7, pp 10-12; Appendix, pp 87a-88a. (emphasis supplied).

The trial court also asked plaintiffs' attorney to explain how the court would avoid having the trier of fact become involved in determining what the teachings of Christian Science required of Respondents.

THE COURT: . . . What evidence do you have that they held themselves out as taking care of those concerns other than as Christian Science practitioners?

MR. CHRISTENSEN: . . . [Y]ou see, I don't go that step. That is what they do, but they claim to heal people . . .

Tr. Sept. 6, pp 74-75; Appendix p 56a.

After colloquy that lasted most of the first day, the trial court granted summary judgment as to the allegation that Respondents failed to frequently visit Matthew, as follows:

THE COURT: . . . I have opened up the discussion in this case on two principles that I thought would be important to my decision on a number of matters. One of those was — and I think it is pretty clearly the law surrounding freedom of religion and application of it to positions of civil liability — and that is if a cause of action requires the fact finder to be deeply imbedded in a controversy between what church-policy tenets require and what they don't, the First Amendment freedom-of-religion clause does not allow that to occur.

Health care is important. Children's sicknesses are important. I, obviously, like most people, have my own personal opinions about which ways parents should deal in taking care of their children and what should be believed and what shouldn't. However, in application of a clear rule of law, I can't envision how trial of an action on failure to frequently visit Matthew does not require analysis of what Christian Science teachings require and don't require as to visiting Matthew under these circumstances, one of the requirements being that they be Christian Science practitioners.

Id., pp 67-68; Appendix, p 51a.

The trial court then asked the parties to address whether this same reasoning should not apply to the other allegations of negligence and misrepresentation, except those of diagnosis. Plaintiffs' lawyer repeated the same arguments he had made earlier, that both sides should put in their facts and let a jury decide whether Respondents had acted reasonably. Again, however, plaintiffs offered no evidence disputing Respondents' assertions that these were statements of sincerely-held religious beliefs.

The trial court then granted Respondents' motion for summary judgment as to each remaining allegation, except for four allegations that the practitioners had diagnosed Matthew's disease. As to these four statements, the Court asked each party to provide a factual synopsis of the discovery so that the Court could evaluate the context in which each statement was made.

Respondents filed a "Memorandum With Respect to Allegations That Defendant Practitioners Made Diagnoses." Appendix, p 95a. Plaintiffs filed no pleading and made no written response to the court's request (nor did the plaintiffs file a response to the memorandum filed by Respondents).

After further colloquy, the trial court ruled that, as a matter of law, the final four statements offered by plaintiffs as a basis for their claims were statements of sincerely-held religious beliefs and could not be the basis for a justiciable claim:

I think it's clear that this is the area that has caused me more concern and more difficulty in making a decision than the other ones, because I do believe that even in a religious context, a secular statement could be made that could be the basis of imposing civil liability.

My analysis of whether or not the diagnoses or the claimed inaccurate diagnoses made in this case, whether or not there is a question of fact whether they are secular, I will take a similar analysis as the one I used in my other rulings on summary judgment; that is, there is evidence proffered by

the Defendant, at least evidence of admissible nature, that suggests they are statements of a sincerely held religious belief. As the Plaintiff indicated to me, *any admissible evidence could create a question of fact that they weren't.*

Frankly, before I read Defendant's brief and response that I received today, I was inclined to believe that, almost on their face, a statement of a specific diagnosis could create a question of fact as to whether it is a secular statement made within a religious context, could be the imposition of civil liability, or is merely another statement of a sincerely held religious belief within that religious context. Given what's in the brief and the teachings of the Christian Science Church as reflected by what I understand is their most important, if not their only, speaker of doctrine, Mary Baker Eddy, which to some extent I have to do to decide whether or not there is a question of fact, it seems to me there is much support for the claim that in order to pray effectively by a person like the individual defendants, there has to be some idea and labeling of what there is, at least a claim, so that the prayers can be tailored.

Consequently, I do see evidence that would be offered by the defendants that would, if believed, establish that these were statements of a sincerely held religious belief.

Now, I must determine, as the plaintiff showed me, the evidence of an admissible nature to bring that into question. Again, what has been proffered is really asking either for an exception that statements involving the health of children should never be considered religious and should always be secular, or that somehow the context and the statement itself create the question of fact.

Here again, as I ruled previously, I don't see the admissible evidence that will bring into question whether or not any of these statements were other than statements of a sincerely held religious belief.

For that reason, I will grant summary judgment on this final claim also.

Tr. Sept. 7, pp 16-18; Appendix, pp 91a-92a (emphasis supplied).

E. Petitioner's Appeal And The Decision of The Court of Appeals.

Petitioner appealed to the Michigan Court of Appeals, raising only one issue:

When religious conduct proximately causes the injury or death of an infant, is the State's *Parens Patriae* interest in Children's welfare sufficiently compelling to permit a common law action in ordinary negligence?

Brief of Appellant in the Michigan Court of Appeals at vi; Appendix, p 129a.

Petitioner argued to the Michigan Court of Appeals that the State of Michigan has a *parens patriae* interest in the welfare of children that "justifies the suppression of the practice" of Christian Science with respect to children by means of civil actions for money damages. *Id.* at 10; Appendix, p 130a.

The Court of Appeals affirmed in an unpublished opinion. It pointed out that Petitioner "did not label a count as 'Christian Science Malpractice', but the allegations under the heading of negligence set forth such a claim." Michigan Court of Appeals Slip Opinion, Appendix to the Petition at App. 33. The Court of Appeals held that Petitioner's argument that a private negligence action is part "of the state's exercise of its power for the protection of children" was "unprecedented and unwarranted." *Id.* at App. 39.

The Court of Appeals gave additional reasons for affirming. It held that the public policy of Michigan favors "the untrammelled exercise of good faith spiritual healing practices" because (1) the Michigan Child Protection Law, Mich. Comp. Laws § 722.621 et seq. excludes Christian Science practitioners from the persons required to report suspected child abuse or neglect;

(2) the Michigan Child Protection Law states that parents "shall not be considered negligent for the sole reason that, in legitimately practicing their religious beliefs, they do not provide specified medical treatment for their child;" and (3) the Michigan Medical Practice Act "exempted Christian Science Practitioners from licensing and from the oversight of the medical practice board." *Id.* at App. 42. Accordingly, the Court of Appeals held that it could "conclude on the strength of the existing legislation, rather than direct and sole reliance on the constitutional guarantee, that public policy militates against providing a cause of action based on good faith spiritual-healing practices." *Id.* at App. 43.

F. Petitioner's Appeal To The Michigan Supreme Court.

Petitioner sought leave to appeal to the Michigan Supreme Court. The Michigan Supreme Court initially granted leave to appeal, limited to certain issues. However, after full briefing and oral argument, the Michigan Supreme Court vacated its order granting leave to appeal and denied leave to appeal on February 10, 1989. Petitioner moved for reconsideration under Mich. Ct. Rule 7.313(E), not for rehearing under Mich. Ct. Rule 7.313(D). The Michigan Supreme Court denied the motion.

REASONS FOR DENYING THE WRIT

I

THIS COURT LACKS JURISDICTION BECAUSE THE PETITION WAS FILED OUT OF TIME

The Petition was filed on August 28, 1989, which was 199 days after the February 10, 1989 order denying leave to appeal. It was thus jurisdictionally out of time. Petitioner had moved for reconsideration of that order, which motion was denied on May 31, 1989.

Petitioner evidently timed the filing of the Petition in the belief that his motion for reconsideration was a motion for

rehearing under this Court's Rule 20.4, and that the Petition was, therefore, timely. However, Petitioner is mistaken.

Motions for rehearing and reconsideration in the Michigan Supreme Court have distinct procedural consequences, which are identified in the sub-rules governing the motions:

(D) Motion for Rehearing. . . .

(2) Unless otherwise ordered by the Court, *timely filing of a motion postpones issuance of the Court's judgment order until the motion is denied by the Court or, if granted, until at least 21 days after the filing of the Court's opinion on rehearing.*

* * *

(E) Motion for Reconsideration. . . . *The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.*

Mich. Ct. Rules 7.313 (emphasis supplied).

Thus, unlike a timely motion for rehearing, which postpones issuance of the Court's judgment order until the motion is disposed of, a motion for reconsideration does *not* stay the effect of the order of which reconsideration is sought. Therefore, the Michigan Supreme Court's order of February 10, 1989, vacating the prior order granting leave to appeal and, instead, denying leave to appeal, was effective when it was entered, and its effect was *not* stayed by Petitioner's motion for reconsideration. This Court does consider the impact of state procedure in determining timeliness of a petition for certiorari. *E.g., Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 307, n 18 (1978) (when petitioner sought rehearing in state court, "which, *under Minnesota law*, defers the entry of judgment until after the disposition of the petition," a petition for certiorari filed within 90 days after rehearing was denied as timely). Therefore, the time for petitioning for certiorari began to run on February 10, 1989, and expired 90 days later, on May 11, 1989. The Petition was,

therefore, jurisdictionally out of time when it was filed on August 28, 1989.

II

THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND

The Michigan Court of Appeals explicitly decided this case on the basis of Michigan law. It held in part II(A) of its opinion that there is no *parens patriae* action in Michigan for money damages to private persons, at least on the facts of this case. Petition, Appendix D, App. 39-40. Part II(B) of the opinion holds that Michigan public policy, as declared by the Legislature in the Michigan Medical Practice Act and the Michigan Child Protection Law, protects the behavior of the respondents. The Court stated:

Whether the balance reached by the legislature is constitutionally required, we need not decide. . . . Suffice it to say, we think that in this case we can conclude on the strength of existing legislation, rather than direct and sole reliance on the constitutional guarantee, that public policy militates against providing a cause of action based on good faith spiritual healing practices.

Id. at App. 43.

The Court of Appeals also held, in part II(C) of its opinion, that if there were a cause of action for negligence, the standard of care under Michigan law would be that of a "reasonably prudent Christian Scientist," not the simple "reasonable man" standard suggested by the plaintiffs. *Id.* at App. 43-44.

Although the Court of Appeals did state that "First Amendment religious freedom is inexorably implicated given the facts of this case," *Id.* at App. 44, its holding plainly rests on Michigan tort law and Michigan public policy as embodied in statutes enacted by the Michigan Legislature.

This Court has stated:

Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

Lynch v New York, 293 US 52, 54-55 (1934).

Although the trial court relied on the First Amendment, the Michigan Court of Appeals based its decision on state law. No reliance on the First Amendment is necessary, as is demonstrated by decisions reached by state courts before the First Amendment was generally held to be applicable to the States. For example, *Spead v. Tomlinson*, 73 N.H. 46; 59 A. 376 (1904), involved negligence claims similar to Petitioner's claims, brought against a Christian Science practitioner who treated a case of chronic appendicitis through Christian Science prayer. The New Hampshire Supreme Court affirmed dismissal of the complaint on public policy grounds similar to those adopted by the Michigan Court of Appeals in this case. The New York Court of Appeals reached consistent results on the basis of state statutes similar to the Michigan statutes at issue in this case in *People v. Cole*, 219 N.Y. 98; 113 N.E. 790 (1916), and *People v. Vogelgesang*, 221 N.Y. 290; 116 N.E. 977 (1917) (Cardozo, J.).

The state ground of decision is adequate for decision and is independent of any federal ground because it rests on Michigan's policy as declared by Michigan's Legislature.⁶

⁶Petitioner suggests in a footnote that the "reading of legislative intent" by the Michigan Court of Appeals is "unwise" and mentions the Establishment Clause. Petition at 13, n 4. No Establishment Clause issues were ever raised in or decided by the courts below. Although the Establishment Clause is mentioned, no Establishment Clause question is raised in the Question Presented or elsewhere in the Petition.

III

THERE IS NO CONFLICT IN THE LOWER COURTS

Contrary to the claims of Petitioner, there is no conflict among the state courts on the issues in this case. The cases cited by the Petitioner do not conflict with the decision below, as a review of the opinions in those cases will demonstrate.⁷ Furthermore, the opinion of the Michigan Court of Appeals was not published and, under the Michigan Court Rules "is not precedentially binding under the rule of *stare decisis*." MCR 7.215(c). In addition, other state courts have, over many decades, consistently reached results consistent with the decision below on a variety of grounds.

The New Hampshire and New York cases cited above are completely consistent with the decision below. Much more recently, *Baumgartner v. The First Church of Christ Scientist*, 141 Ill. App. 3d 898, 96 Ill. Dec. 114, 490 N.E.2d 1319 (1st Dist.), *cert. den.* 479 U.S. 915 (1986), rejected precisely the type of common law negligence claim which Petitioner seeks to make here. Claims against a Christian Science practitioner, a Christian Science nurse and the Christian Science Church resulting from Christian Science treatment of a man who died of acute prosta-

⁷*Walker v. Superior Court*, 253 Cal. Rptr. 1, 763 P.2d 852 (1988), *cert. den.* 109 S. Ct. 3186 (1989) was a criminal prosecution of a parent who failed to provide medical care for her daughter. Of course, Matthew's parents are not defendants in this civil case. The decision in *Walker* turned on the wording and the legislative intent of California statutes which, the court held, required the parents to obtain medical attention. No similar issue is present in this case.

Molko v. Holy Spirit Ass'n. 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. den.* 109 S. Ct. 2110 (1989) is completely consistent with the decision below. *Molko* refused to permit claims based on statements of sincerely-held religious belief to go forward, 762 P.2d at 64, but permitted claims that the defendants intentionally made statements that they knew to be false to induce the plaintiffs to act to their detriment. *Id.* at 53, 56. There are no similar claims in this case.

titis, were dismissed on summary judgment. The Illinois appellate court held that allegations that the practitioner and the nurse deviated from the standard of care of a Christian Scientist were non-justiciable:

“For the Court to determine whether defendants breached any duty owed to decedent would require a searching inquiry into Christian Science beliefs and the validity of such beliefs. . . . [S]uch an inquiry is precluded by the first amendment.”

490 NE 2d at 1325.

The Illinois court also held that claims that the practitioner and nurse “were under a legal duty to comply with the standards of diagnosis and care that are imposed upon the medical profession” have “no merit.”

Furthermore, the facts and procedural posture of this case are highly unusual. The plaintiffs brought a negligence and misrepresentation action against the Church and the practitioners even though plaintiffs admitted that the practitioners were asked by the parents to pray for Matthew in accordance with Christian Science and did nothing other than what they were asked. In a motion for summary judgment heard after full discovery, Respondents presented admissible evidence, drawn in large measure from the deposition testimony of the plaintiff parents, to show that the specific conduct complained of was an integral part of the practice of the Christian Science religion. The plaintiffs failed to proffer contrary evidence and summary judgment was granted in the ordinary course.

The trial court’s ruling was based on both stipulations of counsel and its factual findings, which Petitioner did not challenge, either at the trial court or in the Michigan appellate courts, and does not challenge here. Because this case turns uniquely on its unusual facts and procedural posture, a ruling by this Court is unlikely to provide guidance in any future cases, and certiorari is therefore inappropriate.

IV

THE RESULT BELOW WAS REQUIRED BY THE FIRST AMENDMENT

Even if the decision below had not been reached on the basis of an adequate and independent state ground, the same result would have been required by the First Amendment. Petitioner asserts that the Michigan courts failed to balance the compelling interest in children's health against Michigan public policy and First Amendment concerns. In fact, both the trial court and the Michigan Court of Appeals did so explicitly. As the court of appeals wrote in response to similar arguments, the cases cited by Petitioner do not "predetermine the result of balancing the child welfare and religious freedom interests." Petition App. 40-41.

The plaintiffs sought from the outset to put Respondents' religious beliefs on trial. The leading First Amendment case in this area is *United States v. Ballard*, 322 U.S. 78 (1944), in which this Court held in unmistakable terms that the First Amendment prohibits a court from inquiring into the truth of sincerely-held religious beliefs. *Ballard* involved a Federal indictment against the founders of the "I AM" movement which alleged that the Ballards used the mails to defraud by means of false and fraudulent representations, pretenses and promises concerning, among other things, the power to heal the sick. The District Court held that the jury was prohibited from inquiring into the truth of the representations made by the defendants because they constituted religious beliefs, but the Court of Appeals reversed, ruling that the jury should have considered the truth of the representations. This Court held that no inquiry could be made into the representations of the Ballards, all of which, the Court said, qualified as religious doctrines or beliefs:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Bd of Edu v Barnette*, 319 US 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy

trials are foreign to our Constitution. Men may believe what they cannot prove.

They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

322 US at 86-87.

Because of *Ballard*, and because counsel for all parties stipulated to these controlling legal principles, the trial court painstakingly asked the plaintiffs' attorney, time after time, what evidence the plaintiffs were prepared to offer to contradict the admissible evidence offered by Respondents that the practitioners' statements were statements of sincerely-held religious beliefs. The plaintiffs' attorney not only failed to offer such evidence, but conceded that he could not offer such evidence.

Petitioner does not, and cannot, distinguish *Ballard*.⁸ Indeed, this case amounts to a frontal assault on the free exercise of religion because the plaintiffs proposed to present to the jury

⁸See *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1156 n. 32 (D.C. Cir.), cert. den., 396 U.S. 963 (1969): "[U]nder *Ballard* it seems unlikely that a disgruntled former adherent could sue the church for fraud and deceit . . . on the basis of doctrines, such as those of the Christian Scientists, concerning the cause and cure of disease."

evidence of Respondents' statements of religious belief and have the jury decide simply whether such statements were reasonable. Petitioner's theory, which has no support in the law, is that the First Amendment is merely a defense, which a jury would be free to ignore:

MR. CHRISTENSEN: . . . I say that if they didn't come in in their robes of their First Amendment, there wouldn't be an issue, and I say that those facts have to go to the jury, and then if they want to excuse — and, quite frankly, I guess, if I can conceive of a system such as they have, I can conceive of our jury system to say, "Okay, let's go for it." I trust our system as well as that. *I rather expect what the results would be*, but I say: Why not let our system evaluate that? If it is a good-enough reason, *they can get their acquittal from this jury*. I think they are entitled to the defense, but I don't think we should be prohibited from making our claim.

* * *

And I even said, as I said yesterday, I even said that that I'm not suggesting that that could not be a defense in a court of law, that they could come in and say that's the way we're doing it, that *a jury could one day decide on whether or not they could be exculpated for such activity*.

Tr. Sept. 6, pp 73-74; Appendix, p 55a; Tr. Sept. 7, p 15; Appendix, p 90a (emphasis supplied).

Petitioner ignores that fact that a main purpose of the First Amendment's religion clauses is to prevent juries from deciding whether a person's religious beliefs are right or wrong, reasonable or unreasonable. The jury is presumed to reflect the prejudices and passions of the local community and to permit a jury to decide whether the First Amendment is a "good excuse" or a basis for an "acquittal" or "exculpation," where the facts are not in dispute, is to destroy the protection that the First Amendment was intended to provide.

No matter how deeply one sympathizes with the loss that the Swans have suffered, the decision below is clearly correct. As the trial court recognized, the fundamental assumption of plaintiffs' claim is that Christian Science beliefs about the cause and cure of disease are a sham: it is fraud to tell people the contrary, and it is negligent to attempt to heal through prayer. To accept this claim, therefore, is to put Christian Science on trial. The Constitution forbids such a result.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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September 28, 1989

In the Supreme Court

OF THE

United States

OCTOBER TERM 1989

THE REV. RALPH BROWN, Personal Representative
of the ESTATE OF MATTHEW SWAN, Deceased,
Petitioner,

VS.

JEANNE LAITNER, THE ESTATE OF JUNE AHEARN,
Deceased, and the FIRST CHURCH OF CHRIST,
Scientist, Boston, Massachusetts (The Mother
Church), a foreign corporation, Jointly and Severally,
Respondents.

APPENDIX

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Transcript of September 6, 1983

**STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE**

**ALAN A. MAY, Personal Representative of
the Estate of MATTHEW SWAN, Deceased, and
DOUGLAS SWAN and RITA SWAN, Individually,
*Plaintiffs,***

v.

Civil Action No.
80-004-605-NI

**JEANNE LAITNER, JUNE AHEARN, and
THE FIRST CHURCH OF CHRIST, SCIENTIST,
in Boston, Massachusetts, a foreign
corporation, Jointly and Severally,
*Defendants.***

MOTIONS IN LIMINE ON TRIAL DATE

Proceedings had before the HONORABLE RICHARD C. KAUFMAN (P27853), Judge of the Third Judicial Circuit, in Room 1801, City-County Building, in the city of Detroit, Michigan, on Tuesday, the 6th day of September, 1983.

APPEARANCES:

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REPORTED BY:

Earl A. Foucher (CSR-0017),
Official Court Reporter, CSR-RPR,
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Detroit, Michigan 48226.

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[3]

PROCEEDINGS (9:28 A.M.)

THE COURT: May, et al, versus Laitner, et al.

Could I get the appearances of all counsel, please.

MS. LUTZ: Plaintiffs are ready, your Honor. Sharon Lutz, for the Plaintiffs.

MR. CHRISTENSEN: David Christensen, also appearing for Plaintiffs, your Honor.

MR. SUHRHEINRICH: Richard Suhrheinrich and Mona Majzoub, for Defendant Ahearn.

MR. CHRISTOPHER: William Christopher and David Honigman, for the defendant church.

MR. MILLER: Donald J. Miller, for Jeanne Laitner.

THE COURT: The first thing we have got to do is some housekeeping here, get the tables in a situation so you can have a comfortable seat, so I know where everybody is. It won't be an easy task. Plaintiffs are right, anyway.

The first thing, I am going to ask anybody not connected with the civil case to please move back for a second, so we can sort out the civil case and get people seated in somewhat the right spot.

We are going to have two plaintiffs' attorneys and one of the plaintiffs?

MS. LUTZ: Yes, at counsel table.

THE COURT: Other than the attorneys for the defendants, are we going to have representatives of the defendants [4] at the counsel table?

MR. SUHRHEINRICH: Two of the defendants are individuals, your Honor.

THE COURT: Okay. We don't have enough space here, do we? With all these legal minds here, we should be able to solve this problem, shouldn't we? I think we are going to need another table.

MR. CHRISTENSEN: Your Honor, I know this is a real dumb question, but is there any potential for a different courtroom at all?

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THE COURT: There may be. I would like to deal with all the pretrial matters first and see where we are. At that point maybe we will consider that.

MR. CHRISTENSEN: Okay. Thanks.

(Off-the-record discussion of seating and table arrangements for parties and counsel, same eventually being accomplished.)

THE COURT: Does anybody have any significant complaints about seating arrangements at this point? Everybody reasonably comfortable?

Okay. Now that you are sitting reasonably comfortable, I would like one attorney for each party who is going to argue pretrial motions to come forward, and you can all be up here.

If any attorney feels it necessary to consult with co-counsel at any time, I have no problems, but I think it is [5] going to be logistically hard if everybody comes up.

Is Mr. Christopher going to handle all of it?

MR. SUHRHEINRICH: He is going to handle most of it your Honor. However, if, for the interest of my particular client, I feel I have something to add, then I would ask the Court's permission. Other than that, he can proceed with the motions.

THE COURT: No problem.

I would like to start off. Let me make a few brief remarks.

I have read everything that has been filed in the case, and it is somewhat lengthy. I found all of it well written. I thank all counsel for the help they have provided me. I must submit I think some of it is redundant, but I think that is the nature of the case. It is an important principle. There is a small line between being redundant and stressing an important point. In any event, I found all the pleadings very helpful, well written, and I thank all the counsel for the help they have provided me.

After reading all of these pleadings, I pondered a long time on the way to approach it. Oftentimes in cases that have a number of legal issues like this one has, I found it is not always the most efficient way to just take each separate motion or each separate issue and rule that there is some overlap and relation between a

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number of matters. So I would like [6] to find an approach. I might find it a little more difficult in this case than other cases to decide what approach I want to take. I have decided on one. It may not be the best, but it is the one I have chosen, and, given my position, I guess I get to choose.

The first thing I want to do is to discuss certain issues of law which I think are central to the case. However, until I say differently, I don't want anybody to tell me or argue anything about the facts in this case. When we finish this discussion of the law, there may be a point when we will get into that, but I don't want to talk about that now. Any attorney who starts talking about the facts in this case, I am going to cut them off, because I am, right now, searching for those neutral principles of law that I think I have to apply in this case and that any judge would have to apply in any similar case.

Does everybody understand me so far? Any questions?

Okay. The first issue, the first question to the plaintiff: Do you have any problem with the following being a correct statement of law: that a statement of a sincerely-held religious belief cannot be the evidentiary basis for imposition of civil liability? Do you have any problem? I am not asking about application now. I just want to know if you have any problem with that statement as a clear rule of law.

MS. LUTZ: Excuse me.

[7]

(Ms. Lutz confers with Mr. Christensen.)

MR. CHRISTOPHER: Your Honor, are you focusing yourself at this point on a motion in limine?

THE COURT: I am not focusing on anything right now. I think this discussion, if I reach some resolution in my mind may have application on a number of different things I have to rule upon.

MS. LUTZ: Basically, your Honor, we do have a problem with that as a basic proposition of law.

THE COURT: Okay. Tell me.

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MS. LUTZ: That sets up the scene for everyone saying that what they have done —

THE COURT: No. I am assuming that everybody agrees that a statement made was one of a sincerely-held religious belief.

No factual question. Everybody agrees that was the statement.

Assuming that, as a matter of law, we can say that was a statement of a sincerely-held religious belief, would you then agree that it cannot be the basis of any imposition of civil liability?

MS. LUTZ: Just a minute.

(Ms. Lutz confers with Mr. Christensen.)

If that statement is taken in its purest form, it would be correct. In other words, if someone says, "The moon [8] is blue, and that is my sincerely-held religious belief," that would be okay. If we start having to get into a debate as to whether or not it is true that the moon is blue, then that would be what could not be the basis of the evidence.

THE COURT: I didn't follow you.

MS. LUTZ: Well, if someone says, "I believe and it is my religious belief that the moon is blue," that is a statement of a sincerely-held religious belief.

THE COURT: Okay.

MS. LUTZ: If you have to debate the truth or the falsity of whether or not the moon is blue, then that is what cannot be a matter of evidence. It is the truth or falsity of the matter which is stated as the religious belief which cannot be debated. If everyone agrees that is a truly-held religious belief —

THE COURT: The answer is "Yes" to my question? You agree with that as a basic proposition of constitutional law?

MS. LUTZ: Yes.

THE COURT: Okay.

MS. LUTZ: As long as you are not debating, we don't have to debate the truth or falsity.

THE COURT: If I understand what you are saying, after I asked my question, it is basically that if just saying the statement itself somehow supports civil liability, without any debate as to

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whether it is true or false, you are saying [9] maybe in that context a statement of a sincerely-held religious belief could be some evidence in a civil trial?

MS. LUTZ: The statement, yes, could be evidence in a civil trial just because someone says it is a statement of a sincerely-held religious belief. It is the debate about whether or not the belief is true. In other words, if someone says, "I believe in God," and everybody agrees that is a sincerely-held religious belief, that is fine. If we have to start debating about whether or not that is a true statement whether there is a God or is not a God, that debate could not be the basis of evidence in a civil trial, or the answers to those questions could not be the basis for evidence in a civil trial.

THE COURT: Can you give me an example that would support your equivocation? I mean, give me an example where a statement of a sincerely-held religious belief — that everybody agrees that such a statement could still be of some evidentiary worth in opposing civil liability if you believe you cannot delve into the truth or falsity if the statement is made.

MS. LUTZ: Yes. A simple one: "I believe I can kill people. That is my sincerely-held religious belief. My religion teaches that."

THE COURT: I don't understand the analogy.

MS. LUTZ: Now, the debate as to whether or not your [10] religion teaches that cannot be the basis of evidence.

THE COURT: What cause of action is that going to support — "I believe I can kill people"?

MS. LUTZ: We are talking about evidence in a trial. That certainly would not be a cause of action unless someone were being convicted of murder or manslaughter. I mean, certainly the courts can inquire into that, people can look into that.

THE COURT: Okay.

Do you want to say anything, Mr. Christopher, before I go on to the next point?

MR. CHRISTOPHER: Yes, your Honor. I would like to make one point. In their trial brief, at page 18, they point out a definition for misrepresentation, and they set forth six elements

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that they claim they have to prove to show that the statement that any of these defendants made was a misrepresentation and thus can be a basis for liability in this proceeding. Element number two is that it is false. So they are saying plainly in their trial brief that each and every statement that they are going to show is a misrepresentation in this trial, they must prove it is false. So the second element that Ms. Lutz just mentioned is going to be present in every case.

THE COURT: Well, I think it follows from what plaintiff says —

Let me ask you a direct question. Any statement [11] that you allege is attributable to one or more of the defendants that you seek to base a misrepresentation cause of action on, there must, at a minimum, be a factual question as to whether it was a statement of a sincerely-held religious belief. If, in fact, it is found, either as a matter of law or by a finder of fact, to be a statement of a sincerely-held religious belief, it cannot be a basis of a misrepresentation cause of action? You had better say "Yes." Both your colleagues are nodding their heads.

MS. LUTZ: Yes. If the jury finds that was a statement of a religious belief, as opposed to a statement of fact, then that would be correct.

THE COURT: The next point —

MR. CHRISTOPHER: One more comment before we leave that. I think we show conclusively in our brief that the issue of whether a statement is religious or not is one that must be made in the first instance by the judge, as a matter of law.

THE COURT: Okay. Let's get to that, instead of where I wanted to go. That is an interesting question. I think a key dispute here between the parties is, when you have a factual question as to whether a statement is one of a sincerely-held religious belief or not, whether that means that a fact finder can't decide that or a fact finder can. I guess the question I have for the defendant, Mr. Christopher, is:

If a factual question exists as to whether a [12] statement was a secular one, that could be the basis of imposing civil

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liability, or the result of a sincerely-held religious belief, which could not be the basis for imposing civil liability, does the First Amendment freedom-of-religion clause shield a defendant from normal application of GCR 117.2(3) in deciding whether it is jury-submissible?

To put it another way, if we didn't have the constitutional problem here, it would be clearly a question of fact to go to the jury. Why should the First Amendment shield the defendant from the obligations-of-the-defendant fact questions before the jury or the judge who is the fact finder? I did read your brief, and other than the allegation that that is somehow part of the First Amendment freedom-of-religion clause, I didn't see any cases that really dealt with this issue. Help me out.

MR. CHRISTOPHER: The first judge who dealt with this issue was Judge George Martin, when he was first assigned judge in this case. We filed motions for summary judgment in 1980, and he issued two opinions. He purported to deal with the face of the complaint, because he said on the record he wasn't going to read anything but the face of the complaint in reaching his conclusion; and, in reading his opinion, you can see that is what he did. He dealt with the textual language of the complaint. But he did address this issue in his opinion, and I would read from page 8, which is attached to our trial [13] brief as Exhibit A. He said: "The Court recognizes, however, that while these statements are not inherently religious, they are closely related to questions of religious dogma. For example, the statement that 'Practitioners were able to determine when a child was not progressing,' while not a direct expression of Church policy, nevertheless bears a close relationship to a statement such as 'A cure does not take place if the parent's thinking is faulty.' Thus, although" — this statement and several others he refers to — "are not so inherently religious as to preclude the exercise of subject matter jurisdiction over a misrepresentation claim involving them, it may well be that at trial, much of Plaintiff's proffered evidence will be found constitutionally inadmissible, because its admission would result in the jury becoming excessively tangled in questions of the truth

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or falsity of religious doctrine." And that is the end of the quotation.

THE COURT: I am not disagreeing with that, but I am not sure that answers the question, though.

MR. CHRISTOPHER: The policy issue of why the constitutional protection changes the basic approach, of course, is that we can't submit the question to the jury without involving the jury in the very kinds of things that *Ballard* and *Founding Church of Scientology* and all the cases cited in our brief talk about. Namely, they must examine the church documents, the church doctrine, the statements that were made, [14] the whole context in which the statements were made, and decide if, indeed, it is religious.

Now, as you say, a fact finder, if this were not a constitutional case, can ordinarily do that, but the U.S. Supreme Court has cautioned that the Court cannot involve itself in those very things. Now, if the Court can't involve itself in those very things, certainly the jury cannot, and there has been no case cited that would stand for the proposition that the jury, in the first instance, would decide that.

Now, we do have a section in our trial brief dealing with this very question. Let me refer to it for just a minute.

THE COURT: Let me ask you a question. If any defendant is willing to get up and, under oath, say, "The statement I made was a religious one," doesn't that rule of law result in preventing civil liability from being imposed on the defendant because we have some evidence that suggests it was religious? Your rule of law is that, if we have any question of fact as to it, you can't impose civil liability.

MR. CHRISTOPHER: No. The Court is required, in the first instance, to decide whether the statement is indeed religious. So there is plaintiff's protection. Even the one case they cite on this point, the Oregon case, says that the whole context of how the communication was made must be taken into consideration; and the Court in that instance said that the Court must make an attempt to decide the question.

[15]

Now, we think that it is quite clear that the Court must decide that issue; otherwise, the Supreme Court's statement in *Ballard* and the whole progeny of that case doesn't make any sense. Why would it make any sense that the truth or falsity of such statements can't be a basis for civil liability and yet we give the question to the jury on instructions? The whole underpinning of the constitutional issue has been wiped away. All of the evils that are talked about by the Supreme Court in these cases come to bear on the very decision by the jury of whether it is or is not religious — how the jury feels about this religion, how ridiculous they think its beliefs are, whether or not they identify what those beliefs are not. The jury is not going to be able to wipe those kinds of things out of its mind, and what *Ballard* says, quite unconditionally, is that a defendant may not be tried for his religious beliefs. The moment you submit that question to the jury, whether or not it is religious, he has been tried for his religious beliefs.

THE COURT: Tell me: Don't you have the same risk in having a judge decide if it is religious or not? And if you are right, what evidence should a judge allow: Clear and convincing?

MR. CHRISTOPHER: I think it must be shown by the evidence. I think there is a burden on the plaintiffs to show and I don't think "clear and convincing" would be an unfair [16] standard that this is not a religious contest. We are dealing with a constitutional protection here. I can't bring you authority right here and say whether it should be a preponderance of the evidence or clear and convincing, but when we are dealing in an area that is so very vital to the constitutional rights as this, I think there should be no doubt in the judge's mind that what was said was not intended to be a religious statement.

THE COURT: It is more vital than the right to a jury trial?

MR. CHRISTOPHER: I think there is certainly a balance that you have to weigh there. The Supreme Court talks of balancing all the time, but the point here is that the Michigan

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Legislature has acted in this area. In enacting the Medical Practice Act, the Michigan Legislature has set forth a definition that it believes it is a constitutionally-protected activity. It says that right on the face of the statute, that this is a constitutionally-protected activity; and it says so long as the person is ministering to the sick through prayer and is not administering drugs or otherwise manipulating the patient, that they are free to exercise this constitutional right.

Now, in this case it isn't a close question, and I think, when you do get to the facts, it is not going to matter what standard you apply. I think I can demonstrate that to [17] you from the discovery. I don't think you have to sit here and listen to the facts to conclude that, which is the basis for our last motion. I think the depositions that have been taken in this case clearly show that everyone involved — the parents and the practitioners — understood that everything that was said in this context was religious, and it really isn't a close question. You will never get to the degree or burden required.

THE COURT: Do you agree that within a religious context it is possible for a secular statement to be made?

MR. CHRISTOPHER: Is it possible? Certainly. Anything is possible. They asked my clients that on deposition. Is it possible that a church can be held liable? Sure. You can have a slip-and-fall case in the front door.

THE COURT: I am trying to understand whether your view of the law is that, if it is clear that it is a religious context, nothing done or said can be the basis for imposing civil liability; or are you not prepared to go that far?

MR. CHRISTOPHER: I can conceive of instances. Let's suppose during the course of the prayer the practitioner suddenly drove the person to the store, the parent to the store, to get some groceries, and there was negligence in the course of driving the car. That is not a religious context. They have clearly departed, but we really don't have that here. I can come up with conceivable scenarios. The thing to keep [18] in mind here is that there is no allegation — you won't hear any proofs in this case about

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conduct. Everything that you are going to hear about are statements, and mostly over the telephone. Almost without exception, the statements that are complained about are over the telephone. So we are talking about verbal communications, even higher protected by the law than conduct. That is why their citation of the 1887 *Reynolds* case is inappropriate. We are not talking about conduct that violates the statute. We are talking about verbal-communication statements, that are acknowledged by any statute in Michigan as being constitutionally protected. That is why I do stand here and say that this is entitled to a high degree of protection, and it is not to be treated as the ordinary fact case, and that fact cannot be submitted to the jury.

THE COURT: Okay.

Before I go on to the next thing I want to discuss, do you want to say anything, Ms. Lutz?

MS. LUTZ: I want to say that the *Christofferson* case is the only case I could find that spoke at all to the issue where there was a jury-involved and there were questions of secular belief or religious belief; and I think *Christofferson* set out the case.

"Unless the subject document or testimony can be said to be purely religious as a matter of law, the determination as to its religious or secular nature is [19] left to the jury. Proffered evidence dealing with matters of the type which could, by their nature, be secular or religious is to be characterized by the jury and not the Court. To allow otherwise would constitute an unwarranted invasion of the province of the jury."

THE COURT: What is the title on that case?

MS. LUTZ: DCC 1971.

THE COURT: That is a '71 District of Columbia?

MS. LUTZ: An Oregon case, from the appellate court in Oregon.

THE COURT: State Court?

MS. LUTZ: Yes. We can provide you a copy, if you wish.

I would just like to say that I believe — and I cannot cite you a case; I know I read it somewhere; it might be in the *Christoffer-*

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son case — that once the defense of a religious statement or religion First Amendment has been raised, the burden is then on the defendants to show that it was, in fact, a religious statement or conduct, rather than on the plaintiffs.

THE COURT: You don't get this in the *Ballard* case? You get this from the *Church of Scientology* case?

MS. LUTZ: I can't tell you what case I got it from. It just popped into my mind. I can't cite you the case. I can look it up and give it to you, if you wish.

[20]

I would further submit that negligence is not a constitutionally-protected activity in any context, regardless of what state statutes might say.

THE COURT: I don't want to get off on tangents, but this reminds me of an interesting point, where the defendant's brief, I believe it was, pointed to a statement made by one of plaintiffs' counsel in Federal Court. I forget what the context was, but the response was: "If the defendant wants to argue a constitutional right to practice religion negligently, go ahead." Isn't there such a right?

MS. LUTZ: To practice religion negligently?

THE COURT: How are we going to know it is a negligent practice or not unless we get deeply into church doctrine? So it seems to me there is a constitutional right to practice religion negligently.

MS. LUTZ: I guess it comes back to the question of what is practicing religion and what is practicing something else. You don't want to talk about the facts.

THE COURT: I think we have violated that rule a number of times already.

MR. CHRISTOPHER: Can I make one comment on what you said earlier? I just wasn't prepared to respond to it. You made the statement we had not cited a case for the proposition that the trial judge should rule in the first instance on a factual question.

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The Founding Church of Scientology, the [21] D.C. Case that is cited in our brief, stands for that proposition.

THE COURT: If that is true, I want to know what my standard is if I have to make rulings here. Is my ruling the normal one under 117, that I have got to decide it is a factual question, or is it different because of the First Amendment? If it comes pretty close to answering that question, I would like to see it.

MR. CHRISTOPHER: I think that is what the D.C. Circuit set out to answer in the *Church of Scientology*. It is on page 6 of our brief in support of the motion in limine.

THE COURT: Let me see if we have got the same case here. Is that the case in which they said the statement had to be one that a person must have explicitly held himself out as making religious as opposed to secular claims?

MR. CHRISTOPHER: I think that is the *Christofferson* case. That is the Oregon case. They talked in that Oregon case about holding oneself out.

THE COURT: Talking about the *Founding Church of Scientology v United States*, 409 F2d 1146, this wording is used:

"In order to raise a religious defense to charge of misbranding of device, person charged with alleged misrepresentation must have explicitly held himself out as making religious, as opposed to medical, [22] scientific or otherwise secular claims."

MR. CHRISTOPHER: I have a different quotation from it in my brief.

THE COURT: Is that from that case, though? Somebody cited that to me. I have problems with that. That seems inconsistent with *Ballard*; in any event, I am surprised you are claiming that case.

MR. CHRISTOPHER: There is another one.

THE COURT: Go ahead.

MR. CHRISTOPHER: I will read it to you. I am quoting from 409 F2d at 1165.

"Thus it is incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling

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makes religious claims and hence cannot be submitted to the jury for the factual determinations of whether it is a label for the device in question and whether it is false."

Those last two items were elements in this crime. What the Court is saying explicitly there is that the trial judge has to make the factual determination of whether it is religious before it can be submitted to the jury to determine whether it fits the elements of the crime. I think the exact analogy applies here. The trial judge in this case has to make a determination of whether the statement was religious before the statement can be submitted to the jury for determination of whether it fits the elements of misrepresentation.

[23]

THE COURT: Even assuming you are correct — and I think what you have read here gives you good support for your position — the standard that the *Church of Scientology* seems to be saying a judge is supposed to utilize in determining religious versus secular is not limited to the subjective intent of the speaker. If they are talking about "explicitly held himself out," that kind of objective standard we have got in there, too. No?

MR. CHRISTOPHER: I think the reason that doesn't trouble me, I don't think you will have any problem in this case.

THE COURT: I don't know whether I am going to have any problem or not, but I am still looking for a neutral principle here and trying to find out what standard I should use.

MR. CHRISTOPHER: In the *Christofferson* case, when they talk about how a judge goes about doing this, they talk about the fact you can't take a statement in isolation. You can't take a statement such as, "I believe I can commit murder, and say: "By God, that sure doesn't sound religious to me. I don't believe that is religious." You have got to take the whole context in which the statement is made to reach that decision.

I am not about to stand here and tell you that the only evidence you listen to is what the practitioners' opinion of what they said is. I think you have got to hear the whole [24] context

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in which it is said, and I think you are free to listen to what the parents have to say about it. I am not saying you are limited in what facts you can consider, but this is not a close case.

THE COURT: Sure, I will hear all the context and the evidence during the context, but why am I listening to it? Am I listening to it solely to determine what the subjective intent of the speaker is, or am I also listening to what is the reasonable person's view of the statement, as to whether it is religious or secular?

MR. CHRISTOPHER: When you get into this reasonable man standard, I don't think you can take a reasonable man off the street to make that judgment, because they don't know what Christian Science is all about. They weren't people acting in this context. Every actor in this case was a Christian Scientist. The parents were Christian Scientists.

THE COURT: Is it purely a subjective test of the speaker, or is it an objective test I have got to look at?

MR. CHRISTOPHER: I think you have to look at the whole context.

THE COURT: Okay.

Does anybody want to say anything else before I move on to the next area I want to have a dialect on?

MS. LUTZ: No.

THE COURT: Okay. Question to the plaintiff:

[25]

Do you agree that any civil cause of action that requires significant evidence on what is the actual church doctrine — principles, etc. — cannot be a cause of action for imposition of civil liability? If deciding what is reasonable requires testimony as to what the religion requires in this context, what the church principles, etc., etc., require do you agree that if the Court can't do that, then such a cause of action cannot be the basis for civil liability?

Okay. I have a housekeeping matter. I have four sentences scheduled for this morning, and rather than have the defendants and all those involved wait, I am going to recess this one and take

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the other ones. So you can think about that question while I am doing the sentencing.

(At 10:15 a.m., a recess was taken in this matter while the Court proceeded to other business.)

AFTER RECESS**(10:55 A.M.)**

(All parties present.)

THE COURT: Ms. Lutz?

MS. LUTZ: The answer to your question is: Yes, if it is purely religious doctrine, or purely religious principle we are talking about. As soon as you step into the secular you lose the First Amendment right.

THE COURT: Okay. I agree secular you don't have [26] First Amendment right; religious you do have a First Amendment right. We won't argue too much about that. My question, though, is: If a cause of action requires us to have competing testimony as to what the doctrine is and the fact finder has got to accept one or the other to decide the cause of action, do you agree the First Amendment prevents the imposition of civil liability in such case?

MS. LUTZ: Not if the fact finder has to determine what the competing doctrines are; but, just like Mr. Christopher said, the fact finder isn't going to have to get to the issue in this case, because we are talking about secular.

THE COURT: I am talking about the right, not what the fact finder has to get to. Don't try to anticipate me, if you would, please. I am assuming that, besides the material issues in a cause of action, we are going to need competing testimony as to what church doctrine was and what it required of a certain person. If you have got that situation, can we agree that such a cause of action cannot be the basis of imposing civil liability, because of the First Amendment, assumming those facts?

MS. LUTZ: Well, it begs the question, because we are not going to have the question of competing church doctrines. We are not talking about competing church doctrines. We are talking about the impact on the secular activity. If you are talking purely

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about church doctrine, then I would [27] agree with your statement.

THE COURT: Okay. That is all I am asking. We are going to have plenty of time for disagreements in the application, but I don't want to get to the application yet.

MS. LUTZ: Okay.

THE COURT: All right.

The next question is a key one. The first motion I want to deal with is defendants' motion for summary judgment not the partial summary judgment on the communicable disease but on the summary judgment. Let me tell you how I view it.

I didn't see the pleadings that were filed before Judge Martin, but, from his opinion, he never tells us whether he is deciding it under 117.2(1) or 117.2(3). Mr. Christopher doesn't tell me in his motion, either, which one he is bringing this one under. However, it is clear to me, in reading Judge Martin's opinion, that it was clearly under subparagraph 1, not subparagraph 3, and that the one before me, given the fact that discovery had better be over by this time, when we are ready for trial, that the only route is the subparagraph 3 one to decide now. Those being two separate and distinct motions, with different considerations, the response that Judge Martin has ruled upon does not seem applicable to me.

Does anybody disagree with that?

MS. LUTZ: Well, I disagree with it in my responsive brief. It seems to me he has ruled on the identical motion in [28] front of you. I saw no difference between the two. It seems to me, first of all, that the motion that is being brought is a motion for lack of subject-matter jurisdiction, which seems to be clearly a motion for accelerated judgment under 116 as opposed to anything under 117.

THE COURT: I think it is a question of semantics, whether we call it a 116 accelerated judgment or a 117.2, subparagraph 3, summary-judgment motion.

The term "subject-matter jurisdiction," although used in our state-court system, is kind of a foreign term, really. Once you get

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to ten thousand, subject matter is controversy and a few other things. To call it subject-matter jurisdiction I think somewhat confuses the question to me. I think it is easier to look at in terms of: Is there any evidence that could be offered to create a factual question on any of the causes of action? And we may have to use First Amendment principles to decide what evidence is admissible or not, to determine whether a factual question can be presented on admissible evidence. But it seems to me easier to deal with it as a 117.2(3) motion.

Do you have any problem with that, Mr. Christopher?

MR. CHRISTOPHER: Certainly not with that principle.

THE COURT: How come you didn't indicate what subparagraph your motion for summary judgment was being brought under?

[29]

MR. CHRISTOPHER: Just an oversight.

MS. LUTZ: Frankly, I didn't know what I was doing with this, because I didn't know what Mr. Christopher was getting at in his motion. I had assumed it was a motion for accelerated judgment.

THE COURT: I plan to proceed this way: I am going to give you a chance to tell me why I shouldn't, but it seems to me, at this stage, not only am I not required to, but it would seem impractical for me to wait until the plaintiffs' proofs are over and then decide the question is one of directed verdict where the purpose of GCR 117.2(3) is to not waste the time if there is no admissible evidence that can be offered at least to create a question of fact as to a cause of action, not to reach Mr. Christopher's argument that the standard is not within the question of fact, that it is for the judge in the first instance to decide the religious nature of any statement of conduct.

You tell me why I can't consider this as a first decision, not made by Judge Martin, as a motion brought under GCR 117.2(3).

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MS. LUTZ: It is discretionary with your Honor. There is not law that would say you can't do that.

THE COURT: Okay. I am going to exercise my discretion to view it that way.

Now we have a lot to do.

[30]

MR. CHRISTOPHER: May I make one comment on procedure? It had been my thought that it might be more expeditious to consider the other motions first, and let me tell you why.

THE COURT: Okay.

MR. CHRISTOPHER: Because as to the other motions, each deals with a discreet theory. When we made this motion three years ago and, to some extent, when we make it again now the plaintiffs' reaction has been to throw up a barrage of possible theories that they could be proceeding under. When we filed, really, the four motions earlier, the attempt was to strip off discreet theory and say, "No, you can't proceed under that theory." So when we get through those four, you get down to what is left, and it was our intent to argue this motion for summary judgment on what was left. By doing it in this order, I am going, necessarily, to have to touch on all the others.

THE COURT: The ones that have been excluded?

MR. CHRISTOPHER: No, that we haven't reached yet — the communicable disease, religious statements, the motions in limine.

THE COURT: I understand you are thinking that I switched over a couple times over the weekend in deciding how I wanted to approach it, but it seems to me I may have to make a number of rulings on those motions as a sub-decision in deciding these motions for summary judgment. Therefore, if I am going to have to do that in the summary judgment, I may have [31] decided most, if not all, of those motions by the time I have finished with my ruling on this motion for summary judgment.

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It seems to me the way I wanted to proceed was: Of all the pages I have read, including Judge Martin's opinion, I am not clear, and I would be surprised if anybody was — I hope somebody is, but I would be surprised if there were exactly each of the allegations of negligence still in the case and what each of the allegations of misrepresentation says in the case, either by some broad description, like, "Defendant made a diagnosis that was a secular statement," or, even more detailed, "She said the baby was teething." I would even be satisfied with a broader allegation of a diagnosis; but I want to go through each one of those, and I would like to make a ruling on whether I think there is a factual question. If I decide there is no factual question, I don't even have to reach your argument on whether there is a factual question as to the religious one or whether I have got to make it.

So it seems to me I don't have to reach that yet, and I want to, frankly, pin down each of the separate sub-allegations under the broader allegation of negligence and each of the separate allegations under the broader categorization "misrepresentation" and make a ruling under 117.2(3) on each one of those, and then I will see what I am left with. I may be left with everything; I may be left with nothing. I don't know.

[32]

Do you still have problems with proceeding in that manner, Mr. Christopher?

MR. CHRISTOPHER: No, your Honor.

MS. LUTZ: I have no problem with proceeding that way. I had no idea that is what the Court was going to do with this motion for summary judgment.

THE COURT: Neither did I until I read everything.

MS. LUTZ: I am not so certain that I will be able to respond.

THE COURT: Let's start, and at any point where you think you need more time to prepare, because the Court has indicated it

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will proceed, let me know, and I will decide how much time, if any, you will be allowed to respond. Okay?

MS. LUTZ: All right. Thank you.

THE COURT: Now, as I indicated, I would be surprised, but I am hoping somebody is going to tell me what all the allegations of misrepresentation are that are still left in the case. I want to get some agreement on that before I take one at a time.

I will tell you what I have got. As I went through everything, I read, and then every time I got to something that was new, I wrote it down. Maybe I should tell you what they are and let you see what they are and give you ten or fifteen minutes to see if I am missing some or have too many in there.

Does anybody have any problems with that?

[33]

Okay. Under "NEGLIGENCE" I have got:

"1. Failed to frequently visit Matthew."

If I am going too fast, someone let me know.

MS. LUTZ: Do you know the count in the complaint?

THE COURT: No. I have tried. I have seen so many paragraphs in the complaint, I got confused trying to figure out what was in the complaint or not. I just read everything, and every time I got to what I thought was an allegation not covered, that I hadn't listed, I wrote it down.

MR. MILLER: That is 66(b).

THE COURT: Okay.

"2. Did not consult a doctor or report the case to local health officials."

MR. CHRISTENSEN: Excuse me. I would have to ask the Court to go a little slower. I know we want to get this.

THE COURT: Okay.

Everybody with me?

MR. CHRISTENSEN: Yes, your Honor.

THE COURT: "3. Made inaccurate diagnosis."

Let me back up a minute. There is something more.

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This is the listing as I see it, the negligence allegations against the two individual defendants. I have got another listing of those that were made against the Church as direct claims of negligence. I have got those three, plus I have a fourth one, that I have described as, "Individual [34] defendants coerced the parents of Matthew Swan to not seek medical attention." At some point we will have to discuss whether that includes anything more than the three other things that I have indicated, but that is the fourth one I have got for that.

MS. LUTZ: I have a fourth one, your Honor.

THE COURT: Fifth one.

MS. LUTZ: "In failing to consult with" —

MR. CHRISTENSEN: Sharon, I think you are missing the point. He is saying that would be a different category, I think.

MS. LUTZ: Okay.

MR. CHRISTENSEN: Excuse me again, your Honor. You didn't cite that as an allegation of negligence against the individual defendants, but a category that may or may not belong in that group?

THE COURT: I didn't know where to put it.

MR. CHRISTENSEN: That is what I thought. You are now done with your list of allegations?

THE COURT: After that one, I am, yes.

MR. CHRISTOPHER: Against the two individuals?

THE COURT: Just against the two individuals. I have another list as to those against the Church.

What else do you have?

MS. LUTZ: I have: "In failing to consult with the [35] physician on the anatomy involved."

THE COURT: Didn't I say that — "Did not consult a doctor or report the case to local health officials"?

MS. LUTZ: You lumped them together.

THE COURT: What else am I missing as far as negligence allegations against the individual defendants?

MS. LUTZ: That they failed to act as reasonable, prudent persons would.

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THE COURT: Sure. I am talking more specifically about this case.

MS. LUTZ: All right.

THE COURT: That is the law. That is not really an allegation.

Okay. Let me go through each of these on my list. We will take about a ten- or fifteen-minute recess, because I have other things to do, and you can tell me whether my list is incomplete or too complete.

Okay. Negligence against the Church:

1. Agency as to all the ones you just listed for the practitioners; and then "2" I have got listed as "Direct allegations of the own negligence of the Church:

"(a) By failing to sufficiently educate and train practitioners and nurses in their treatment with and of small children.

"(b) By failing to instruct practitioners in the rudiments of communicable/notifiable disease so that reporting obligations could be carried out. [36]

"(c) By failing to adequately monitor and supervise the activities of practitioners and nurses in their treating of minor children."

Okay. That is all I have as to the negligence against the Church.

Misrepresentation claims against the individuals:

"1. That medical treatment would offer no solution to the symptoms that Matthew Swan was experiencing.

"2. Statements of specific diagnoses."

That is all I have. I may be missing some.

MS. LUTZ: "Statements that Matthew was improving."

THE COURT: Okay. It might fall under "Able to determine when a child was not progressing."

MS. LUTZ: Yes.

THE COURT: But add that one, too.

Okay. Now the list as to the misrepresentations against the Church.

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Agency again, obviously.

Do you have a claim that the Church directly indicated that practitioners were able to determine when a child was not progressing or just an agency claim against the Church on that misrepresentation?

MS. LUTZ: The agency statement that they sent the whole process in motion by sending practitioners out to render treatment.

[37]

THE COURT: You don't understand my question. Do you have any claim that the Church directly indicated that to your clients?

MS. LUTZ: No.

THE COURT: Only through their agency, you claim, with the practitioners?

MS. LUTZ: They directly communicated it through their literature; yes, they did.

THE COURT: You claim that your clients read it, relied upon it?

MS. LUTZ: Yes.

THE COURT: So your answer is "Yes"?

MS. LUTZ: Yes

THE COURT: That is the first one, then.

MR. CHRISTOPHER: Say it again.

THE COURT: "Practitioners were able to determine when a child was not progressing."

"Practitioners were able to determine if a child had a communicable/notifiable disease."

Is that an agency claim or a direct claim?

MS. LUTZ: Direct claim.

THE COURT: And 3: "Appropriately trained nurses, who understood practical wisdoms, were available."

MS. LUTZ: Direct claim.

THE COURT: Good.

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[38]

Here is the way I would like to proceed now: I have given you my four lists of what I see are the four basic causes of action — misrepresentation and negligence claims against both the Church and practitioners. I would like the defendants to get together and decide what I am missing. Don't worry about what is included that you don't think should be included, because we will argue about that; just if you think anything is missing. I doubt you are going to say anything is missing.

More importantly, I want the plaintiff to tell me what is missing. Add to the list what you think is missing. I want somebody to go type up these four lists, and then we will come back and we will take each one individually, and I will make a 117.2(3) ruling on each one.

Do you have any problem?

MR. CHRISTOPHER: No, your Honor.

THE COURT: Okay. I will see you all at 1:45.

(At 11:30 A.M., a recess was taken in this matter while the Court proceeded to other business.)

AFTERNOON SESSION

(1:45 P.M.)

(All parties present.)

THE COURT: Are we going to have the same people at the bar that we had this morning?

MS. LUTZ: Afternoon shift, your Honor.

[39]

THE COURT: Whoever is going to represent, please come forward.

(Mr. Christensen and Mr. Christopher come forward.)

My first question is to Mr. Christensen.

Will you agree that the pleadings you have just filed would—entitled “ALLEGATIONS OF NEGLIGENCE AND MISREPRESENTATION”—include everything that you intend to try to get to a jury on?

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MR. CHRISTENSEN: Yes, your Honor, under the Court's guidelines that these were consensual allegations. I haven't listed the specifics of each category, but those would be the allegations we have.

THE COURT: Have you had a chance to look at these with any degree of time, Mr. Christopher?

MR. CHRISTOPHER: No, your Honor. It was just handed to me when it was handed to you. I was just checking down them to see what we hadn't discussed this morning. Some of them are different.

THE COURT: The way I want to go about this, as I indicated, I want to take each one individually.

I guess the first thing I want to get is an indication from the defendants whether or not they think it out of the case already, based on Judge Martin's ruling. If it is not, then I think the next step is a 117.2(3) analysis. Any problem?

[40]

MR. CHRISTOPHER: No problem.

THE COURT: Okay. Let's start at the top, until I decide to go in different order.

Okay. Roman numeral "I," Allegation No. 1:

Has Judge Martin ruled on that yet, Mr. Christopher?

MR. CHRISTOPHER: He left that in. That is paragraph 66(b). Actually, let me answer that two ways.

THE COURT: I understand he had a lot of dicta that will be of concern to me, but I want to know if there is an order yet getting it out.

MR. CHRISTOPHER: Let me point one thing out to the Court about Count I of the complaint, and that is that he struck paragraph 65. Let me read paragraph 65 to you. It says: "That defendants owed a duty to the plaintiffs to perform their practitioner work in accordance with the rules and regulations of the Christian Science Church." They struck that paragraph, and they used as reasoning they couldn't base any of their allegations on failure of practitioners to follow rules and regulations of the

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Christian Science Church. In our view, that struck Count I, because that is the only paragraph in the count that alleges any duty.

Paragraph 66, then, says: "That defendants breached that duty in the following particulars:" and then he went through there, and he struck three of those, but —

THE COURT: You are saying Judge Martin's decision [41] is kind of inconsistent, because he expressly said he was going to leave that in, although when you look at the other things, that was only the claim of a breach of a duty, when he apparently impliedly, you think, indicated that the duty that set up that breach was gone?

MR. CHRISTOPHER: Yes. I think he didn't really stand back and look at Count I and realize that everything in paragraph 66 follows from paragraph 65; and I think we are going to get into that a lot today, because all of these things that they talk about in paragraph 66 they took out of our books, out of Mrs. Eddy's writings, until they filed a trial brief. When they filed the trial brief, suddenly all of these things were common-law duties. No longer were they based on the rules and regulations of the Church, which Count I is clearly couched in terms of. So what you are going to hear today is, suddenly, "Oh, we are no longer saying that they should consult a doctor on the anatomy involved because that is written in the Church manual. That is a common-law duty."

So we are going to be arguing a lot of different things today than were written in this complaint. When they wrote this complaint, there was no doubt that paragraph 66 flowed from paragraph 65 and that each one of these elements — and I can show you where it came from — came out of Mrs. Eddy's writings.

So, to answer your question, 66(b) is still in [42] there. Their original theory is gone, and they have a new theory, which they are going to tell you about today. —

THE COURT: Nonetheless, after all you said, I think I have to apply the 117.2(3) analysis to Roman numeral "I," Allegation No. 1. Right?

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MR. CHRISTOPHER: Right.

THE COURT: Question, Mr. Christensen: Tell me what admissible evidence there is, including that evidence that the First Amendment is not going to require me to keep out? What admissible evidence do you plan to produce at trial to show that they breached some duty owed to your clients by not visiting Matthew one time, five times or a hundred times?

Let me get to the more direct question that concerns me. Everybody agrees that negligence is not doing what a reasonably-prudent person does, even setting aside the question of duty for a moment and talking about breach. Clearly, one of the circumstances here is that the Christian Science Church was involved and that these people were Christian Science practitioners; and, certainly, it seems to me one of the circumstances was that they were consulted in their capacity as Christian Science practitioners. So a reasonable person under the circumstances seems to be a reasonable Christian Science practitioner who was approached by plaintiffs in this case, and so on and so forth. How does a person decide whether the amount of time, if any, that they visited Matthew was reasonable [43] or not reasonable under the context without hearing evidence from a Christian Scientist about how many times a practitioner is supposed to visit Matthew or somebody similarly situated?

MR. CHRISTENSEN: I can answer that, Judge. What the Court anticipates being concerned with I believe is a defense, and I say that in this regard: Whether Mr. Christopher's analysis of this Count I, paragraphs 65 and 66, is accurate or not doesn't matter, but we still start with this proposition: What we are taking a look at here, Judge, is common-law-duty negligence. With respect to what? With respect to healing or treating a sick person. Christian Science practitioners assumed the duty to treat and heal Matthew Swan. Now, having assumed that duty, I think that —

THE COURT: I guess I had better ask you: What is the evidence that you are going to offer to create a factual question that they assumed a duty to heal him?

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MR. CHRISTENSEN: Okay. There will be evidence of representations of both individual practitioners and, in a broader sense, representations —

THE COURT: You are going to have to tell me what the representations are.

MR. CHRISTENSEN: Okay; that "Matthew is being healed," or that "I will take care of it. I will heal this person."

THE COURT: The next question is: What evidence [44] are you going to offer that that was not a statement of a sincerely-held religious belief?

MR. CHRISTENSEN: I am going to offer that that statement was made. I submit, your Honor, that that statement having been made, that statement having been presented, that job having been accepted has its secular implications and its secular consequences. It cannot help that.

THE COURT: That is not going to be enough for me. You are going to have to give me some evidence concerning state of mind or whatever else you think is relevant to making a determination of whether a statement is a statement or a sincerely-held religious belief. Just to say that "We are going to put the statement in evidence and let the jury decide" is not enough, I don't think.

MR. CHRISTENSEN: Your Honor, what they did is, they made representations, and they responded to a call for treatment for a physical ailment, and they said that they would treat this, and they said that they would take care of it, and they said that they would heal it. That being done, I think they have to be measured by the standard of a reasonable and prudent person in terms of the activities that they engaged in in healing, this process in taking care of this baby.

THE COURT: Well, isn't it your theory that there is no reasonable person out there to undertake this except a medical doctor or someone who has the same skills?

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MR. CHRISTENSEN: I don't think that is true at all. I think a number of people can assume obligations and can assume duties in common law to come to the assistance and to aid and provide care for a person who is hurt. I think that the *Farwell* case —

THE COURT: I read that.

MR. CHRISTENSEN: — is the strongest expression of that.

THE COURT: One goes out; one gets hurt. That doesn't have the freedom-of-religion problems that this case has. I don't have a problem if someone assumes a duty and volunteers that there can be a duty there; but I am dealing with First Amendment problems that permeate this whole thing.

You are saying to me, "I want to create a duty to establish a breach by not visiting Matthew frequently enough partially based on the evidence that I am going to put on that one of the practitioners said 'I will cure Matthew.'"

MR. CHRISTENSEN: "... 'I will treat Matthew.'"

THE COURT: "... 'I will treat Matthew.'"

You want to say merely a statement of another person that "I will treat you" or "I will treat your son" creates some kind of duty to visit a certain amount of time or that a jury should be free to say how many times you are supposed to visit them. You want to keep it apart from the fact that these are Christian Scientists involved or that these [46] statements may have been made as a result of a sincerely-held religious belief. Now, to just put the statement out there, without any other evidence as to whether or not it was a secular statement or a statement of a sincerely-held religious belief, I don't think is admissible evidence upon which we have got a factual question yet.

MR. CHRISTENSEN: I think that it begs an initial question, too, and that is the over-all proposition that they will treat not only Matthew, but the public at large, and that they will provide healings for the public at large with respect to their method.

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THE COURT: I'm sorry. I know I am interrupting a lot. I try not to do that, but there are so many things that come to my mind that if I don't interrupt you and do it, I am going to forget them, and it may preclude missing a point about this. I will apologize ahead of time for interrupting everybody, but I have a feeling I am going to do it more than once.

Now I have forgotten what I was going to ask. No. Here it is:

I get the feeling from your brief and from what you have told me that your position is that you can never have conduct that is religious or a statement of a sincerely-held religious belief when you are in the context of treating disease or illness, and that once you undertake that task, the [47] law should say you can't be religious anymore.

MR. CHRISTENSEN: No. I wouldn't say that, although I will say it is relatively close to that, but I wouldn't say that. I say whenever you have a statement of religious belief or a sincerely-held religious belief that has impact on or affects secular activities, that the Court's initial question when we came here today, that was to determine whether a statement is a secular statement or a religious statement — that it begs that initial question, and it has to be resolved by virtue of looking at that statement, determining whether or not it has secular impact. Then, if indeed it has secular impact, it is the obligation of those who want to guard themselves in the road with the First Amendment to prove that this is a sincerely-held statement of religious belief, but they cannot hide behind that. They cannot say, "We will take a look at this. What we are talking about here is religion," when the simple understanding and the common understanding of what they are involved in is such as to have wide, serious, broad secular impact in terms of what it is being offered for.

THE COURT: I don't dispute that. I think all reasonable people can agree that many, many statements coming from churches or other places have profound secular impact; but I have not found any decision — at least in all of what I have read — that secular impact is a test of anything.

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MR. CHRISTENSEN: I think that what they were talking about is that the *Christofferson* case, the Oregon case, leaves us with and resolves — I think as the Court was anticipating — the issue in favor of concluding that when that situation arises — and I think the Court, in its earlier question asked, “How is the Court so much better able to determine this than any other trier of fact?” — when that arises, then they submit themselves to the jurisdiction of this court to resolve what that is. If they, themselves, want to claim that this is a sincere statement of religious belief, then it seems to me that, in order to claim that, they have to answer the allegation; they have to make their statement with respect to that and claim the protection of the First Amendment.

THE COURT: You are the plaintiff. You have the burden of proof. Defendant — if not by affidavit, surely by sworn testimony — at this point is saying that the statement you allege and every statement in this case was a statement of a sincerely-held religious belief. GCR 117.2(3) now puts the onus on you. Give me some admissible evidence you are going to put on in this trial to make a factual question of the matter. All you are saying is: “Let the jury hear the context. Let them hear what we are saying, and let them decide it.”

MR. CHRISTENSEN: I really say this, your Honor: Under 117.2 (3), the onus is not on me. I think this: They have to show there are no material facts as to other than [49] damages. That is their obligation.

Now, we start out with this, your Honor — and the Court was understanding the issue so very clearly this morning I believe, by virtue of the way you framed the question: We start out with an allegation that says, “Hey, Defendant, you assumed an obligation to heal this child, to treat this child. Now, that duty having been assumed, that allegation then is provable by evidence to suggest you did this or you did that.”

What makes this case different from any other case, admittedly — and I think we all agree — is that they come in and tell

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this court, "Well, we agree with what you say, Plaintiff, except for the fact that we have sincerely-held religious beliefs. You have to understand that."

So it seems to me, your Honor, in order for this court to decide that issue, I think the Court has to look to the defendant to go forward on the burden of proof with respect to that clause on its face; and absent their claiming the protection of the First Amendment and the religious protections associated, the Court is not faced with a dilemma.

THE COURT: They claim every statement they have made in this case was a statement of a sincerely-held religious belief. What evidence that is admissible are you going to put on to create a factual question as to that?

MR. CHRISTENSEN: I will put on evidence — it seems to me — and maybe we are not talking at direct purposes [50] here; I might be having a hard time understanding, but I honestly believe that once — if you will agree that this allegation would be an appropriate allegation absent their claiming their protection because of sincerely-held religious beliefs, then why is it — I might turn around and ask, "Why is it, because they claim it, that it is somehow factual?" And if the Court says, "Okay, Plaintiff, you now have a burden to prove that their claim is not true, that their claim of religious protection is not true," I am not sure I can do that because then I have to go to them. I have to say, "Come on and tell the truth," or "Come on and do something."

I say this: that we have to take a look at this case on the basis of the actual facts that occurred, independent of religious interpretation, because those statements, those facts — that relationship that was established is specially established, and I cannot then assume a burden that is going to say I am going to prove they don't mean it. That is effectively what I think the Court is trying to say. I can't do that. I can show the Court that certain things happened, that certain things were said and that they all had to do with taking care of a sick child.

I am going to beg the Court to step back and take a look at the question and see if that question really should be put to

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plaintiff; but, rather, aren't we really looking at the question the Court introduced initially and have to take [51] a look at the defense claim of, quote-unquote, immunity from otherwise acceptable allegations of wrongdoing?

THE COURT: You say absent the Christian Science context, or words to that effect. I don't know what the situation would be if we didn't have that context here, someone walking off the street and assuming a duty. I don't know. I don't know how I analyze it assuming that. That is a central part of this case and a central issue I have to deal with is how the First Amendment impacts on this case.

MR. CHRISTENSEN: I can state, although I don't want to complicate it a bit further, I think the Court should know and will know during the course of this trial that this business of healing treatment, this business of saying, "We are going to heal you; we are going to take care of you," is a system of providing health care, a system of providing healing that is not offered only within a religious context. I think the Court should know this is healing that is provided by these practitioners not only to members of the Christian Science Church. This is for the public at large — "Come, ye" — if you will. "Walk through our door, and we shall heal ye."

THE COURT: Even if this is true, I don't know how that is relevant to the question of what they do while engaged in this healing ministry, whether or not it is religious conduct or whether or not the statements that are made are the [52] result of sincerely-held religious beliefs.

Okay, I did it to you. You can do it to me.

MR. CHRISTENSEN: Not now; occasionally.

THE COURT: I am still stuck on this point, and until I see what evidence is going to be offered to dispute the response to your complaint that is going to be admissible evidence, they are going to get up on the stand and say: "I said these things, and I said them because I believe in them and that they are tenets of the Christian Science religion." How are you going to create a fact question that they are not religious statements?

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MR. CHRISTENSEN: Factually, we have a sick boy, a very sick boy. Evidence will be presented of that. Factually treatments were rendered. Factually, visits were made. Factually, visits were also not made. That is to say, the facts of this case were such that a duty to treat and to heal was assumed, and then certain activities went on. Crucial to all that is an actual assertion of a claim that "I am taking care of this." These are all actual facts, actually treatment.

Now I know I am coming back to where you were before, Judge. Now they come back onto the stand, and they want to say: "Yes, but you have to understand this is a sincerely-held religious belief"; and except for the fact that they are Christian Scientists, except for that, then we wouldn't be resolved with that claim. In other words, they are the ones [53] that I say are taking the protection of the First Amendment and claiming it.

That being the case, and looking at the issue that the Court had earlier — and I am going to again ask the Court to look at it from this perspective — that being the case, maintain that it is their obligation to convince you as a matter of law that this does not have any secular application; but, rather, that it is purely and simply and exclusively a statement of sincerely-held religious beliefs. Short of you being able to conclude that that is, without exception, an unadulterated and absolutely one-hundred-percent-pure statement of religious belief, we then have the dichotomy the Court was talking about earlier today, and we walk back into the situation of looking at these facts in the light of evaluating what a reasonable and prudent person would say about them, and without the benefit of — this is a different argument. Let me stop right there.

At that point, it is their obligation to say: "Yes but, you see, the reason you can't say I am wrong is because I am wearing First Amendment clothing today." We do our job by proving it. It is their job to defend it, and if they can convince you under their theory, then you can say, "Well, yes. As a matter of fact, the way the Court introduced it, if we all agree, then I am not going to ask to prove anything if I agree that it is sincerely and without

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exception a sincerely-held [54] religious belief; but until we get to that point, then we have to take a look at our trier of fact and let them determine it in the face of what is reasonable and prudent under the circumstances as they factually existed.

THE COURT: You seem to be saying that any time a claim is based on any statement in a religious context, all the plaintiff has to do is file a complaint, and it is the defendant's burden to plead an affirmative defense, and we still have got a jury question.

MR. CHRISTENSEN: Not really. Could I try to use an analogy that was thrown out this morning?

THE COURT: Yes.

MR. CHRISTENSEN: Say a sincerely-held religious belief is "I believe it is okay to kill somebody." You ask: "What is the wrongdoing in that? How is that actionable?" I think the answer to your question, Judge is that it is not, that if I sincerely believe that I can kill people, I sincerely believe that I can commit heinous crimes, I sincerely believe that I can be involved in arson, none of these things are actionable or of event. But the day civil authorities look at this particular participant, this actor in our society, and say "You know what? We have got evidence that you killed this person; we have evidence that you did this thing," then it becomes relevant, I think, to show intent. To show thoughts, you know premeditation, it would become relevant. Then we say: "Now, [55] look. You are entitled to have your thoughts, and you are entitled to have your sincerely-held religious beliefs; but the minute you start acting on that to the extent it affects us in our secular capacity" — the minute they begin to do that, Judge, then I think it is time for us to say: "Okay, the facts are as they are. If you want to say that in court go ahead. You can claim that, but it is not going to be a defense to the secular implications of your activities."

I honestly think that is how we are going to have to resolve that, Judge. I mean, honestly, that is the way I think it is.

THE COURT: To summarize, you think a factual question is created on whether or not these are statements of sincerely-held

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religious beliefs merely by saying the context has a secular impact?

MR. CHRISTENSEN: I am saying this, your Honor: I don't even need statements here. I am not relying on a statement here. I am relying on a fact.

Once we assume duty and the fact of this actual treatment —

THE COURT: My problem is: How do we determine what the duty was? For example, how many times are they supposed to visit him? Other than church policy, how many times is the practitioner supposed to visit him?

MR. CHRISTENSEN: Your Honor, I guess we are [56] going to need more evidence, based on reporting of symptoms, based on the fact that the mother here now has him. I don't think that we have an issue on duty. I don't know. Maybe the Court is telling me that we have an issue on duty. I think I am assuming from your conversation —

THE COURT: I assume that somebody who does what the defendant did created a duty, but how can I tell whether they breached that duty without delving into Christian Science doctrine and determining how often practitioners are supposed to visit Matthew?

MR. CHRISTENSEN: I am trying, but I am finding it difficult.

Assuming, then, that duty, what we have are the facts of this case. Don't worry about Christian Science doctrine or Christian Science thought or Christian Science religious belief. Let's just take a look at the facts of this case.

On a daily basis, yea hourly from time to time, this person who has assumed the duty is being told of changing symptoms, of progressively deteriorating conditions in the person for whom they assumed the duty. Reports are made, and I might be wrong, Judge, but I am going to say in at least four instances visits are made. So that, regardless of why it was done, factually, in manifestation of the assumed duty, the practitioner then visits and takes a look at the child [57] physically; more telephone calls are

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made, and again and again and again telephone calls. Those are the facts, Judge, from which I think a reasonable person can conclude — and we are now, for the purpose of this conversation, saying, you know, “We haven’t heard the First Amendment answer yet” — a reasonable person can conclude: “What would a reasonable and prudent person who has assumed the duty of taking care of a person do under those circumstances?” We can’t tell them that. You know, they can say, “That person did a good enough job. They listened, and they went about their business.” But I think it is also very likely, Judge, that they can conclude that anybody who says “Yep, I am going to treat your sick child” — anybody who says that will go take a look at that child.

THE COURT: Doesn’t the defendant, assuming you are correct, have a right to put on evidence that the circumstances were that the Christian Science practitioner, who has these beliefs in the Church, says: “This is how many times I am supposed to visit and how many times I am not supposed to visit, and I have the right to go into and decide what church policy is”?

MR. CHRISTENSEN: No. I don’t think we are into deciding what church policy is.

THE COURT: Don’t they have a right to put that kind of evidence in?

[58]

MR. CHRISTENSEN: I think they have a right.

THE COURT: And isn’t it a question of whether or not you have a right to rebut what Christian Science teaching say with respect to people like the defendants treating sick people?

MR. CHRISTENSEN: Now you have me to the point where I have to think, where I have to answer that.

THE COURT: You weren’t thinking before?

MR. CHRISTENSEN: You didn’t notice?

THE COURT: All right.

MR. CHRISTENSEN: I don’t think that I could use their doctrine.

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THE COURT: No, but they may want to use it to say: "I was reasonable under the circumstances. Here are the circumstances about Christian Scientists."

Now you put on this evidence: "Judge, I am under the reasonable-person standard, and, based on what a reasonable person assuming this duty would not, they don't visit enough."

They come back: "Now we have got to put in all the evidence of what the circumstances were, what the Christian Scientist practitioner believes is the duty in terms of 'How often am I going to treat?' "

MR. CHRISTENSEN: Could I have a short conference?

THE COURT: Sure.

(Mr. Christensen confers with Ms. Lutz.)

[59]

MR. CHRISTOPHER: Am I going to get a right to reply at some points?

THE COURT: Yes.

MR. CHRISTENSEN: Two responses — I guess I should never say "two" — essentially these:

As I understand it, after they say: "Well, this is Christian Science doctrine. You have got to understand I was relying as a Christian Scientist," I can cross and say: "Well through using their documents, no, you are not telling the truth. That is not Christian Science doctrine"; but I cannot say, "That is Christian Science doctrine, but that is wrong. I can't say that.

Let's look at it from this perspective: Assuming an otherwise obligation to act in a certain way, in a reasonable and prudent way, can persons then exempt themselves from the rules of general society and say, "But, don't you see, these rules don't apply to me"? They can have a reason for it, but they cannot immunize themselves from the application of our law with respect to their activities.

THE COURT: You have still got to answer my question. How does the jury avoid having to decide what Christian Science says about visits to a sick person by people in the defendants'

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position once the defendants try to defend the claim of negligence by telling you what Christian Science requires? That is certainly evidence of what is reasonable [60] under the circumstances.

MR. CHRISTENSEN: Your Honor, I am in a difficult position to argue, because, as of yet, I don't know they are going to say that. I don't know that they have any doctrine which says, "I can't go visit." I don't know that at all. Again, I have argued a bunch of times to encourage you, Judge, to put the cart before the horse, or the horse before the cart or to switch this burden, that you are asking me to do, around and to tell them that they have to prove that, somehow or other, I am precluded from offering my secular proof, my proof of secular activity. How can I now — and I am guessing — I don't know that there is a Christian Science doctrine that says they may not visit or it is against their religion or anything like that.

It seems to me that the first step is taking a look at what happened in this case, and then, if they impose the issue, I think they have the obligation to come forward with the burden of proof on that. They haven't told you that we can't provide these things.

THE COURT: I guess I have still got a fundamental problem. Who is the RPP in this case? Who is the reasonably-prudent person? I think it is the reasonably-prudent Christian Science practitioner who does it. You want it to be some other reasonably-prudent person, when both the complaint and answer admit these are Christian Science practitioners.

[61]

MR. CHRISTENSEN: The complaint says that, but this is exactly why, and Judge Martin already took care of this, quite frankly. You see, I am not holding them to their own standard. Judge Martin said I can't. He said that. To approach this case under that method invites the very, very serious applications of the issue that this court is requesting me to respond to. So I think we do have to take one step further back, and the issue is not about these people being reasonable and prudent Christian Science practitioners. The issue is: Can they set themselves off from

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the rest of our society and say: "When we assume a job that we have offered to the general public for the purposes of healing, can we assume from the beginning, from the start, that if we don't do something reasonable and prudent, you can't judge us on account of it?"

I am saying, your Honor, under the circumstances of the entire approach of these practitioners and under the entire approach of the Christian Science practicing system — I am not talking about the Church, but the health-care system that they provide — that, starting with that, you have got essentially a system that is competitive to medicine, to do the same thing, to offer secular healing, to offer cures for illnesses.

And so you are right in saying that is where we should start. We have to take a look at that, and these [62] people do not get to avoid the consequences of general law by virtue of the fact that they claim and are listed as Christian Science practitioners. They have to be looked at in terms of what they are doing, your Honor.

MR. CHRISTOPHER: Your Honor, if that is his position, I think he ought to go to the Michigan Supreme Court and get their decision we cited overturned, because he is simply flying in the face of all the law that has ever been set on this subject. You can't read *Ballard* and agree with him. *Ballard* says — just let me read a couple sentences: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." Now, that is exactly what he is doing. He is putting us to the proof of our religious doctrines or beliefs. The minute he asks his client, "What did you call Mrs. Laitner for?" — the minute he tries to introduce something about these defendants, we are going to be on our feet. That is, our only way we can protect our clients' constitutional rights is to prevent that evidence from ever going to the jury, because we have a constitutional right not to have our religious beliefs tried, and that is exactly what he is asking you to do. You can't, under *Ballard* do it, and I don't think we ought to talk about this case in grand principles.

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I think we ought to do what you started out to do, and that is to pin them down under specific allegations and [63] find out why it is that practitioners have to frequently visit. Well, you don't have to go very far. You go right to the text of their complaint. They said why they think practitioners have to frequently visit, and if Mr. Christensen doesn't know why, he didn't read the discovery in this case, because his partner, Sharon Lutz, questioned both of the Christian Science practitioners and every one of our witnesses out of a booklet put out by the Christian Science Church, because she read this right to our defendants and asked them about it: "In children's cases it is important for parents to give earnest consideration to engaging a practitioner listed in the Christian Science Journal, since state statutes accord some recognition to such practitioners. Furthermore, arrangements should be made" — this is again addressed to the parents — "for a practitioner to visit any child promptly who is being treated for a condition which may be deemed serious and for the practitioner to make such visits frequently, if needed."

Now, their allegation in the complaint is quoted right out of that publication, and they used it in their discovery to question the defendants; and then, when we took the discovery of their clients, we asked them the same question, and our whole inquiry was directed at "Why do you believe the practitioners should make frequent visits, and what is it that they have done that you think they should have done differently?"

[64]

I will just read a few excerpts. This is from Mrs. Swan's deposition at pages 135 and 136:

"Question: Did Mrs. Ahearn ever relate to you that she didn't need to make house calls, because her job was understanding Matthew as a spiritual idea?"

"Answer: Yes."

Then there are some questions about the timing of that.

"Question: Was that in response to a request by you that she make a house call?"

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"Answer: The subject may have been discussed peripherally. I did not make a formal request for a house call, and she did not say, 'No, I will not come,' but because she had initiated this judgment of a house call, I considered that it was counter-productive in her concept of Christian Science treatment.

"Question: The house call was counter-productive?

"Answer: Yes. When she said, 'I do not need to see Matthew, because my business is understanding him as a spiritual idea,' and I understand that to mean that, in her concept of Christian Science treatment, it was better for her to give absent treatment, staying at her house."

Now, as said at the beginning, discovery in this case is complete. The parties ought to know what the allegations are at this point, and they are not some common-man [65] theory of liability. They are based on what the parties to this have said about this in their depositions. It is quite clear from Mrs. Swan's deposition, and there is similar comment in Mr. Swan's deposition, that they understood the concept of absent treatment in Christian Science, that, in the practitioners' concept of Christian Science treatment, they did not have to be present to pray for the child. That is what they understood. That is the context they took the statement to be in, and it ended up in this complaint.

Talking about whose burden it is is chasing our tail. The first time they ask their clients to open their mouth in front of a jury about it, we are going to ask for an out-of-court evidentiary hearing on what this statement is, where it came from, what was the context in which it was said, and what have the parties said about it in their depositions, that their understanding of it was that it was completely spiritual, that the justification for the position was spiritual and that they understood it in that context.

Given that evidence, your Honor, it can't get to the jury, because to give it to the jury is trying us for our religious beliefs, and that is exactly the way I think we ought to try it through each and every one of these: "Where did it come from?" "How did the parties understand it?" "What have they said about it in their depositions?" and "Is this claim going to the jury?"

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[66]

I think this is a good example to start with. We have got all the cards on the table. Mr. Christensen doesn't have to wait to learn what his clients said or what my client said. He knows. It can be clearly demonstrated to the Court with respect to each of these statements what the parties understood them to be and the fact that they did understand them to be made in a spiritual context, just as that one was.

THE COURT: Okay.

Anything else before I rule on Roman numeral "I," Allegation No. 1?

MR. CHRISTENSEN: I just might offer, your Honor, from the deposition of June Ahearn, this testimony on page 24:

"Question: Are you ever urged to visit children as opposed to rendering telephone treatment?

"Answer: Yes. We have had letters that — procedural letters, that type of thing, not mandatory, but just the basic procedures."

Further on the page:

"Question: Do you know why you would be encouraged to visit children as opposed to rendering telephone treatment?

"Answer: No, I do not."

Now, I am citing this to the Court because of what I thought was the Court's earlier request to find data about this. I don't submit that it is particularly relevant to the issue as I would ask the Court to understand it in this case. [67] That is to say, it doesn't matter whether the Christian Science hierarchy encouraged them to make telephone conversations or visits under the proposal that I gave.

I would like to also add at this time, your Honor: It is not, in my mind, of any particular moment what Rita and Douglas Swan thought was the significance of any statements that were made to them with respect to the treatment of this child. I think that the particular moment and the issue is whether or not that activity which seeks to address treatment of a real ailment is to be measured in terms of the actions that surrounded that activity and

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the conversations that surrounded that activity, not the subjective analysis that anybody particularly brings to it.

THE COURT: Okay. Thank you very much.

I have opened up the discussion in this case on two principles that I thought would be important to my decision on a number of matters. One of those was — and I think it is pretty clearly the law surrounding freedom of religion and application of it to positions of civil liability — and that is if a cause of action requires the fact finder to be deeply imbedded in a controversy between what church-policy tenets require and what they don't, the First Amendment freedom-of-religion clause does not allow that to occur.

Plaintiffs have, to some extent, basically tried to describe this case as merely putting all the evidence in and [68] instructing a jury, "If you think the defendants were reasonable under the circumstances, find for them, but if you think they were unreasonable under the circumstances, find for the plaintiffs."

Health care is important. Children's sicknesses are important. I, obviously, like most people, have my own personal opinions about which ways parents should deal in taking care of their children and what should be believed and what shouldn't. However, in application of a clear rule of law, I can't envision how trial of an action on failure to frequently visit Matthew does not require analysis of what Christian Science teachings require and don't require as to visiting Matthew under these circumstances, one of the requirements being that they be Christian Science practitioners.

For that reason, I will grant summary judgment on Roman numeral "I," Arabic "1."

Now I will give each side a chance to say anything that they want to before I rule on Roman numeral "I," Arabic "2," and Roman numeral "II," Arabic "2," a, b, c and d.

MR. CHRISTENSEN: I'm sorry, your Honor. Did I understand that the Court was striking all allegations under Roman numeral "I"?

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THE COURT: No. What I have ruled on is just Arabic "1" so far. That is all I gave you a chance to discuss. I am not sure I know how the application of my decision is going to be different in Roman numeral "II," but I will give [69] you a chance on that. At the same time, I want you to incorporate any response you have on Roman numeral "II," Arabic "2," a, b, c and d.

MR. CHRISTENSEN: I see what you mean.

THE COURT: I will go back to "3" and "4."

MR. CHRISTOPHER: We are skipping down now to Roman numeral "II"?

THE COURT: The decision I have just made, I just made application to Roman numeral "I," Arabic "2," and to Roman numeral "II," Arabic "2," a, b, c and d. I am not sure about "3" and "4" of Roman numeral "I." I didn't tell you people I was doing it that way.

MR. CHRISTOPHER: I understand.

THE COURT: I didn't know how I was going to proceed on them, but I want to give you a chance to speak on how my rule of law may be different for those. I think there may be arguments there why they are different.

I know I am confusing. Is everyone with me now?

MR. CHRISTOPHER: Yes. I would suggest that on Roman numeral "I," Arabic "2," we divide our discussion between the first half and second half, because I think they are quite different.

THE COURT: I don't have any problem with that.

MR. CHRISTOPHER: At least, I would like to direct my comments that way.

[70]

THE COURT: You don't think application of my decision that I just made goes similarly to both?

MR. CHRISTOPHER: Yes, I do, but I think there is a little different analysis. Maybe it would be better to hear what Mr. Christensen is going to say about it.

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THE COURT: Right now, I want to talk about Roman numeral "I," Arabic "2," and Roman numeral "II," Arabic "2," a, b, c and d.

MR. CHRISTENSEN: Okay.

THE COURT: I guess I am asking, Mr. Christensen, whether you agree or not with what I just ruled. Doesn't it follow on those?

MR. CHRISTENSEN: Your Honor, you give me a pretty good job here. I don't want to be repetitive, because I think the Court understands my position. So I'm not going to repeat. But it seems to me that, in evaluating these conditions — and I know the Court read the brief — that in looking at these cases on which the Court relies, that it is distinguishable at least to the extent that none of the cases that have been cited to the Court have included cases in which the health and rights of children have been involved. It is significant in this respect: The Court has two plaintiffs here. There are the adult parents, that the Court might like to make a determination in light of their conduct, and there is another plaintiff here, and that is the Estate of Matthew Swan. I am [71] not trying to reargue what I said before, but I am encouraging the Court to include in its analysis consideration of the fact that, for the claim of this estate there was no involvement in terms of buying the system — quote-unquote — or participating in the program. I think this is a public policy that I am sure the Court is aware of. I feel that the Court is. But, given that and then going on to the cases that we have cited in our brief, the pretrial brief or whatever you call it, the trial brief, in evaluating conducts of people, we drew the analogy from the doctor cases, the *Hankins v Harvey*, the 248 Michigan 639 case, in which the Court found that the evaluation of, in that case, the doctors' belief was not material. What was material was the behavior that went on, what actually happened what they actually did. Given that, it seems to me that — I offer it for added impetus to the conclusion that —

THE COURT: I appreciate what you have said. I think it is clear we have a fundamental disagreement on one point. If you

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say we don't need to look at the standards of Christian Science and determine what was required of these people, I don't know how we do it without doing that.

MR. CHRISTENSEN: Okay.

THE COURT: I think that is the fundamental disagreement. I am not sure I am right. If there is any exception that any court is going to make with respect to the freedom-of-religion rights of the First Amendment not being [72] a subject for determination by a jury, this would seem to be the one where you start; but after so many United States Supreme Court opinions, not to mention a lot of higher courts than this one, I don't think it is proper for me to start making these exceptions.

MR. CHRISTENSEN: Okay. Let me respond just factually to each of the allegations and see if I can divvy out or discover anything that will work.

Again it is somewhat repetitious, but ultimately I imagine that this matter will be resolved.

THE COURT: Higher?

MR. CHRISTENSEN: Probably; I don't know. At any rate, your Honor, so that the record can reflect my thinking on it, if I may —

THE COURT: Sure.

MR. CHRISTENSEN: — again, you have full-grown adults — I am addressing now Allegation No. 2 — you had full-growth adults, Laitner and Ahearn, that assumed the job of taking care of a sick baby. The Court will learn factually that these people aren't trained. They don't know anything about medicine and therapeutics. Then they offer their services to take care of sick children and cure any and all ailments, have what may, and they took that job. As reasonably-prudent adults, mentally-competent in terms of carrying on activities of daily life, they saw a child who progressively [73] went from fever through severe fever, through convulsions, through immobility, through vacant stares, through a progression of symptoms — inability to swallow, inability to stand up; inability to sit up — and these people allowed that baby to deteriorate to the point where, when he was admitted in St. John's

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Hospital on the 30th of June, 1977, the doctor didn't even bother to do — and this is factual testimony that the jury will hear — the doctor didn't even bother to do a spinal tap. Instead of doing any of the usual diagnostic procedures to discover the source of this infection, they knew right then and there, in this nearly comatose baby, that they were going to drill holes in that baby's brain and allow abscesses to drain.

Any baby that is that sick and is being looked at by grown-up people who say, "I have got a job to take care of that baby" — and I know the Court's answer, but I am saying that this record ought to reflect that those grown-up people didn't do what, I venture to say, even a little bitty person with a fair amount of common sense, any grade-school seventh-grader or fourth-grader would do, and that is to pick up a phone and call a doctor or, at a minimum, to report it to some health official. I say that if they didn't come in in their robes of their First Amendment, there wouldn't be an issue, and I say that those facts have to go to the jury, and then if they want to excuse — and, quite frankly, I guess, if I can [74] conceive of a system such as they have, I can conceive of our jury system to say, "Okay, let's go for it." I trust our system as well as that. I rather expect what the results would be, but I say: Why not let our system evaluate that? If it is a good-enough reason, they can get their acquittal from this jury. I think they are entitled to the defense, but I don't think we should be prohibited from making our claim.

THE COURT: There would be no acquittal in this case, no matter what happens.

MR. CHRISTENSEN: You are right. I misspoke. I didn't mean to. I meant no fault.

THE COURT: I know what you meant.

MR. CHRISTENSEN: Now, in looking at the allegations of negligence against the Church, a through d, again, given the facts, I want to tell the Court what a jury would hear, given the opportunity.

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Any system that is set up to serve the public generally and to take care of the public's health concerns, conditions of health, and then —

THE COURT: Please get to my question: What evidence do you have that they held themselves out as taking care of those concerns other than as Christian Science practitioners?

MR. CHRISTENSEN: They held themselves — you see, I don't go that step. That is what they do, but they claim [75] to heal people, and so let's take a look at it and see what really happened. Then we can go back and see why they claim something separate, because what they did is, they had a system of alternative health care, and they called it "Christian Science practitioner," but you can call it any name you want. Whatever you call it in terms of having the Court evaluate this doesn't matter. If they said they were Company X, Y, Z and did the same thing, would they be able to get away with the same things and say: "Wait a minute. We are going to change our name and throw in 'Christian Science practitioners' "?

It doesn't make any difference to me in terms of what the Court asked me to take a look at, because within that system they did this: they built and promulgated an organization that delivered health care and said, "We are going to take care of you" — not only Christian Science practitioners, not only adults, but babies that can't even understand that fundamental concept; but I think that is an important part to include in this. In fact, this is a dramatically important part. I think if adults want to engage in foolish activities, then perhaps, given some circumstances, we can say: "This is an adult activity now, and if adults want to do that, providing it is not illegal, they can carry on with this"; but they are now in the business of saying: "We have got this health-care system, that is going to take care of babies that are sick" — take care of everybody, but for the purposes of these motions [76] now, babies that are sick. I am not saying they specifically set that one up, but it is true.

Here is what they didn't do: They didn't train their practitioners, and this we will prove. They had a two-week course, but

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beyond that there was no training to teach the practitioners how to take care of small children or instruct them in the rudiments of understanding communicable or notifiable diseases, and no training of their practitioners in any aspect of how to respond to small children. More importantly — and I put it in “d”: “In failing in their duty to operate a healing system in such a way as to not cause damage to minor children.”

Minimally — and I don't think there is going to be any dispute about this — wouldn't we expect a system that was organized to take care at least not to do damage? If you can do no good, at least do no wrong or do no harm.

The trier of fact will learn that these allegations will be proven. Those are the facts that I say, your Honor, substantiate a basis of allowing the jury to consider these issues.

THE COURT: Okay. Thank you very much.

You know, no matter how wrenched my heart can be by particular facts of a case — this one is a moving situation — it is my duty as a judge, at least in following the constitutional provisions under the First Amendment, in not allowing a [77] civil trial to be an attack on religious beliefs, no matter how much I may disagree with them personally or not. I cannot see how a trial on Roman numeral “I,” Arabic “2,” and Roman numeral “II,” Arabic “2,” a through d, would not require an assessment of what Christian Science requires and what it doesn't require to determine what was reasonable under those circumstances and what was not reasonable. I believe that gets a civil court too deeply imbedded in determining what the rightness or wrongness of a particular religion is.

For that reason and for the reasons I mentioned in my earlier summary judgment, I will grant summary judgment for the defendants on all those counts.

Roman numeral “I,” No. 4.

What evidence are you going to offer that any conduct or statement that you base that on, “In coercing parents not to get medicine,” was secular conduct?

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MR. CHRISTENSEN: "In coercing parents not to get medicine" factually is a broad concept. Frankly, what we have to offer in testimony is that there will be representations from the individual practitioners that they told Rita and Douglas Swan that "Medicine cannot cure your baby." They told Rita and Douglas Swan, when their baby was gnashing its teeth on, I think it was, the 29th of June — I reserve the right to amend the accuracy of that — that they should ignore that.

THE COURT: Ignore what?

[78]

MR. CHRISTENSEN: Ignore the gnashing of teeth. Rita Swan told them, "Why can't you see Matt?" She was probably planning some great achievement. They told Rita and Douglas Swan, "Don't worry about the symptoms." They have to ignore the evidence when they reported their child was moaning with pain, when they reported that their child now had a blank-fixed stare, when they reported their child was unable -

THE COURT: I want to stop you for one minute. So far, everything you have listed, I can't see how it would not fail under the rubric of making an inaccurate diagnosis. Are these two separate? If not, let's go to making an inaccurate diagnosis as No. 4. Do you have any other allegations under No. 4 that you are not going to have under No. 3?

MR. CHRISTENSEN: That wasn't the way I was going to argue it, but I could argue it that way.

THE COURT: From what you said before, you disagree as to 4.

MR. CHRISTENSEN: Now I do.

THE COURT: It is not now "making an inaccurate diagnosis"?

MR. CHRISTENSEN: I don't think that is an inaccurate diagnosis. That isn't what I contemplated in telling the Court about "inaccurate diagnosis."

THE COURT: Okay.

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MR. CHRISTENSEN: Here is how they coerced them not [79] to go to medicine. It is distinguishable in this respect: When we come to "inaccurate diagnosis," I will tell the Court the factual diagnosis that these people made with respect to Matthew. I am not doing that now, and the Court may very well say we are talking about the same thing, but I appreciate the distinction. If the Court doesn't afterwards, I will allow the Court — you know, I am not going to insist there is a distinction, but I believe there is one.

THE COURT: All right.

MR. CHRISTENSEN: Should I continue, then?

THE COURT: Yes. Tell me what else you think is evidence of coercion.

MR. CHRISTENSEN: Okay, this: literally telling the parents that they should not pay attention to what they physically, actually see; telling the parents that this child is improving and that this child is getting better; telling the parents that if they go to medicine, it will induce the disease. They literally and actually kept these people from going to medicine after they had made a resolve that they would go to medicine and they would get care for the child. They said, "Do not go to medicine." It can only do what? "It can only make your baby worse," in effect. So they said, "By virtue of going to medicine, you are involved in disease" — in looking at the overall application and suggesting to Rita Swan who had, in fact, just eight months earlier, nine months [80] earlier, been to medicine, herself, after six years of treatment with Christian Science practitioners for a pain in her left side. One year after — it is factual, Judge, and I think it is important for you to understand it — but one year after a doctor had diagnosed an ovarian cyst on her left, after one year of treatment and a lesion being removed from the ovarian cyst, they told the Swans: "The reason your boy is sick is because you went to medicine, and medicine made you, in effect" — I was going to say "dirty," but medicine is the problem here. "If you hadn't been over there and getting yourself involved in medicine, your son wouldn't have gone and been in this condition; and don't you dare

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go back to that system now, because that is the system that got you in this problem."

THE COURT: Anything else?

MR. CHRISTENSEN: Those are along with the assertions of claim that they could heal.

THE COURT: The first question: Everything I have heard is a statement. Would you agree that, in support of the coercion the parents claims, it is all statements that you are going to say were the coercing elements?

MR. CHRISTENSEN: To the extent I would insist, your Honor, that that is true; but I would add that those statements have to be understood in terms of the psychological impact they had.

[81]

THE COURT: On the reliance aspects?

MR. CHRISTENSEN: Yes.

THE COURT: But I am talking now about the basis. It is all statements?

MR. CHRISTENSEN: Yes, words that they used.

THE COURT: I will ask another question. I hope don't go around on it again, because you haven't changed my mind, but you can comment on it again. What evidence do you have as to any of those statements that they were not the result of a sincerely-held religious belief?

MR. CHRISTENSEN: I am not going to review it, but the Court is missing the point. Those statements are statements that ought not to be examined in view of sincerely-held religious beliefs; but, rather, those statements are statements that have to be evaluated in terms of the impact that they have on these people in terms of their general impact on the secular life.

THE COURT: I see problems with that, given our discussion about a statement of a sincerely-held religious belief, whether accepted objectively as that or not. *Ballard* seems to say, and it seems to me the law is, that if, in fact the subject intent was that it is a sincerely-held religious belief, it cannot be the basis of

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imposing civil liability. Therefore, if we have the defendant saying that is what the statement was, the plaintiff, having the burden of proof, I [82] think has to give me some evidence — it doesn't have to be much yet, but some evidence — from which we can conclude it was not such a statement.

MR. CHRISTENSEN: I understand what the Court is saying; I truly do; but I find it hard to believe that our system of American justice can entertain a proposition that, because religion is involved somehow, we can't discuss the truth of the situation; and the truth of the situation is that these things occur. I don't think that that First Amendment was ever created to say that religion is now a good excuse for not allowing people to hear the truth about the facts of the case. In that case, it was —

THE COURT: It is clear that riots have been started by people who have been protected by the First Amendment, but, for some reason, we still protect them.

MR. CHRISTENSEN: I wouldn't disagree with that, your Honor. I agree.

THE COURT: I tried to indicate that I don't deny that we may have had and did have tragic results by what may have been provable or not provable as false statements; but you are saying you can't believe what the First Amendment protects. I view it as protecting the —

MR. CHRISTENSEN: Except, Judge, they engaged in activity that if other people had engaged in that activity, they could not escape civil immunity. To say, "Yes, but I [83] did this one for Jesus," just doesn't seem to me that they should get to walk out of this courtroom on the basis of having said that.

THE COURT: I agree. That is why I am inviting you to give me the evidence from which somebody can conclude it was secular. If somebody off the street who has no affiliation whatever with the Church says, "I made a statement to Jesus," and you came in and showed me: "Here is the background: 'He was never involved in this, never involved in that, never attended church. He told somebody, just before: "I am going to make this statement so

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I can rely on the First Amendment," you may have a factual question about whether it is religious.

I am inviting you to tell me any facts you can produce to create a factual question as to that.

MR. CHRISTENSEN: I will tell you what I am encouraging the Court to do. I suspect strongly I am not going to, but we are not looking at a situation where we are looking at beliefs only. We are looking at a situation in which beliefs went beyond beliefs. They can sit in their little corners and believe all day long, and I am not going to ask that our judicial system look into those beliefs; but when those beliefs start affecting and have application so as to allow a wrongful death of an infant child...

Another fact the Court ought to have: the medical facts in this case are going to prove that, within a clear [84] medical probability, had earlier treatment been available, this child would be alive today.

All of these facts are secular facts. All of these facts tell that trier of fact, our jury, that "Here is conduct" — not belief, but conduct now, and conduct can be speech — "Here is conduct that resulted in the wrongful death of this boy." Then — and I still say this — if they then want to walk into this courtroom and say, "But don't you understand this is a sincerely-held religious belief?" at that point that can be evaluated, and at that point I can't speak to the truth or falsity of it.

THE COURT: Okay. I appreciate what you are saying.

MR. CHRISTENSEN: I know you do. There may be others I would rely on and incorporate, if I may, your Honor, for all of these allegations, so that any appellate court won't one day be confused on the entirety of recitations of facts that have been set forth in the depositions, as well. I really didn't anticipate I should give an exhaustive, and I didn't think the Court is asking me to give a totally exhaustive recitation of facts; but they would be of that nature.

THE COURT: I have already said you don't have to read everything that has been filed. I am left with asking for what is a question of admissible evidence. I am relying on you now. I don't

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think that is going to foreclose you from saying to the Supreme Court, "I missed telling Judge Kaufman [85] this: . . ."

MR. CHRISTENSEN: I understand.

THE COURT: Okay.

MR. CHRISTENSEN: Again, your Honor, and I understand what you are saying, but I would like to add this with respect to all allegations: that our clients — again I question the true significance of what their understanding is, but I think it is important to this extent: They understood there was secular significance to these statements and to these claims, and certainly they knew that they were Christian Science practitioners, but their expectations were secular. Their expectations were healings, were factual, actual healing.

THE COURT: How is healing a secular expectation? It seems to me the expectation was that Christian Science practitioners, whatever they do, would bring about a cure.

MR. CHRISTENSEN: That is right.

THE COURT: If the means are religious, I don't understand how the cure is secular.

MR. CHRISTENSEN: I can tell the Court, and the Court will learn as the trier of fact, that until June 20, 1977 four days after — 17, 18, 19, 20 — the fourth day of involvement — until that occasion, June 20, 1977, Rita or Douglas Swan had never in their life heard of Christian Science treatment. They had never heard of one. What they knew was: you got sick, you picked up the phone; you said, "I need a [86] treatment"; you got better; and you paid. Now, that is the extent of it.

THE COURT: Okay. As you said, although that is interesting and may be relevant to some things in the case, I am still faced with the rule of law that I had coming here today and I had leaving this morning's session, that we have to look at the subjective intent of the speaker. If his subjective intent was to make a sincerely-held statement about religion, then that cannot be the basis of imposing civil liability. Therefore, to my mind, a question of fact has to be created that any of the statements that you just indicate would support your allegation of negligence, to-

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wit, "In coercing parents not to get medicine," there is a question of fact as to that. I don't see that, and for that reason I will grant summary judgment on that one.

I want to skip Roman numeral "I," Arabic "3," for a little while.

We will take a ten-minute recess.

(At 3:10 P.M., a recess was taken.)

AFTER RECESS

(3:18 A.M.)

(All parties present.)

THE COURT: Okay. I want to talk now about Roman numeral "III," 1 through 6, except 2. I want to ask plaintiff [87] again:

Any of the statements made by the defendants that you want to impose liability, what evidence do you have that they were not statements of a sincerely-held religious belief.

MR. CHRISTENSEN: Okay, your Honor. The statements that I have are all of the factual activities that were speech in this case made by the defendants; and I am submitting to the Court as I have in the past — and I hope the Court will allow me to continue, because I do want to say it — that where in fact, a Christian Science practitioner or anybody else — and I guess that is where we want to start — when, in fact anybody, any adult, competent human being, assumes the job and I don't know if we said it before; I think we have, but it might be a new one — assumes the job, for pay, to heal — part of this alternative health system is that they assume their work to be paid for what they did — when they say, "I am going to take money for healing your child," and then set up a program of healing the child by saying, "Do not go to medicine. Medicine will offer to help you, but medicine will only induce the disease. Medicine is basically opening up the floodgate of more disease" — any human being that is smart, that is reasonable and prudent and intelligent, carries out their secular activity of trying to heal a real illness. By virtue of telling the people who are in charge of this child that

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"Medicine will do nothing but hurt you," that "Medicine will [88] induce your disease; ignore the evidence" — you have heard some of this, but it is under misrepresentation — that when a report is made that "My baby is now lying in bed, unable to get up, is feverish, gives a vacant stare, has a blank expression, is convulsive, is gnashing his teeth" — when those statements are made to a person who is in charge of healing somebody and then that person turns around and says, "Oh, ignore the evidence. You have to ignore the evidence. Don't look at that. Find something that is progress" — that this speech activity is activity that a reasonable and prudent person would evaluate as not being good healing practice; it is careless healing practice; and all of this activity is activity that, as a matter of fact, I don't think will be denied. I don't think it will be suggested it isn't true. So we are coming back once more to the conclusion, your Honor, that we have an abundance of evidence that we can offer a trier of fact to arrive at a conclusion that misrepresentations are being made.

In giving all of them, in giving these facts, your Honor, these facts are false, and we will prove it; they are known to be false, or they are made with such a careless disregard of their accuracy that we can prove it.

THE COURT: I am assuming that for the time being, because those are the other elements, false reliance and all that. We have still got a First Amendment problem.

[89]

MR. CHRISTENSEN: I think you have heard it, but I am going to ask the Court's indulgence for a trip once more to counsel table.

THE COURT: Go ahead. (Three plaintiffs' counsel.)

MR. CHRISTENSEN: Well, your Honor, very briefly I am not trying to be repetitive, but I think I have to be with respect to all of them — I think that I have highlighted to the Court the activities that were carried out that I believe are totally secular.

THE COURT: Once again, as I said before, I do think, given the strong case law that interprets First Amendment freedom of

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religion, that if defendants respond to an allegation or something that is a misrepresentation by saying that was a statement of a sincerely-held religious belief, that it is the plaintiffs' burden to show some evidence to create a factual question that, in fact, that statement was not a statement of a sincerely-held religious belief. Again plaintiffs are arguing, as I have indicated, if there is going to be an exception in this area, then statements that have an impact upon the health of children may be such an area; but until such an exception is made by a higher court, it seems to me that application of GCR 117.2(3), with a backdrop of the First Amendment freedom-of-religion clause, requires the plaintiffs to give some admissible evidence to rebut the defendants' would-be testimony that these are statements of a sincerely-[90]held religious belief. Having heard none, I will grant summary judgment on Roman numeral "III," Nos. 1, 3, 4, 5 and 6.

MR. CHRISTENSEN: Could I try again, Judge, on that if I can?

THE COURT: Sure.

MR. CHRISTENSEN: To me, the issue as to whether or not this is a sincerely-held religious belief fails to comprehend the body of evidence that is offerable in this case that does not need to inquire into that. I don't care what their sincerely-held religious beliefs are. I don't care that they sincerely think that Matthew wasn't sick when he was gnashing his teeth. What it seems to me the jury is entitled to hear is the evidence that was there, and there again I think it is their problem. I think that it is only then that they can say "Now is the time for me to tell you something. I claim First Amendment protection." I just don't know how they can come and stop us before we even offer, because the facts I would offer would not be — I am not offering religious beliefs to the jury. I am offering the facts of this case.

THE COURT: One of the facts is that the defendants have admissible evidence that, if believed, would require somebody to find that these are sincerely-held religious beliefs. What evidence do you have to rebut that?

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MR. CHRISTENSEN: I offer that Court the *Christofferson* case to suggest that, if we got to that point, that is a [91] determination for the jury to make. I know I have made the argument, so I won't repeat it again, but it just seems to me we have got to go there first and let the jury make a determination along those lines.

THE COURT: Do you have a copy of the *Christofferson* case?

MS. LUTZ: No, I don't.

THE COURT: I remember it being cited, but I can't say I am fluent on every case that is cited in all the briefs.

MR. CHRISTOPHER: That is not what it says, your Honor.

MR. CHRISTENSEN: I'm sorry. We don't have it.

THE COURT: I would more accurately understand arguments if I had a chance to read it.

What is the cite on that? Does somebody have that?

MR. CHRISTENSEN: It may be attached to something here, Judge.

THE COURT: While they are looking for it, Mr. Christopher, could you tell me the facts and the holdings in *Christofferson*?

MR. CHRISTOPHER: Surely.

Your Honor, the Church of Scientology of Portland, Oregon, had an educational center and had a sign in front of the educational center. This woman went to the educational center to take one of their educational courses. She [92] testified that at the time she went there she was told this was purely for personal advancement and had nothing to do with religion. Later, she applied to become a member of the Church of Scientology. She became a member, went through a series of struggles, was deprogrammed by her parents and sued the Church and they moved to dismiss the claim on the grounds that everything that was done was religious, and her lawsuit involved an attack on their religion.

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The appellate court in Oregon ruled that, because of the evidence that she had put in the record that she had gone there not knowing that it was a religion, because it had no religious signs on it, and because of her allegation that they told her that it was not a religious activity, that the judge would have to, in the first instance, decide whether or not it was a religious activity, and if he concluded, with the evidence that had been presented to him, that it was not, that he could present that to the jury. There is some discussion in that case about what the judge would do if he couldn't make that determination, and the appellate court said — this is the state appellate court — that in Oregon, in their view, he would have discretion to present factual issues to the jury on that question if he couldn't make a decision from the obvious face of it.

At that point we would disagree with that case. I think it departs from *Ballard* in that sense.

[93]

THE COURT: Before we get to that, assuming Mr. Christopher is right, that is what I am really looking for you to shed some light on. Defendant said, "Here is a secular statement I am about to make of religious conduct." I know you don't think I need to look for that, but that is what I am looking for, assuming that is the *Christofferson* case.

MR. CHRISTENSEN: I keep saying they are all over the place, Judge, every one of them.

THE COURT: Okay.

MR. CHRISTENSEN: How can the statement that "Your baby is not ill," how can the statement that "I am healing the baby," in view of the fact that this baby is going through the throes of the most dire consequences of spinal bacterial meningitis — how can that be interpreted in any light other than the actual facts that are there to be evaluated? How can it be interpreted in any light other than a secular light when a baby who is nearly comatose is being told, "You are not ill; you are not

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sick; you are perfect; you are doing good; you are progressing"? How can that be interpreted in any other light?

THE COURT: You are saying that these statements, on their face, at least create a factual question as to the secular nature?

MR. CHRISTENSEN: Oh, yes, Judge. They are only secular. They are secular statements.

THE COURT: That medical treatment would offer no [94] solution to Matthew's health problem?

MR. CHRISTENSEN: Or that Matthew was not ill, "Matthew isn't sick."

THE COURT: They are secular on their face?

MR. CHRISTENSEN: I think so. If you were to ask people of ordinary intelligence looking at a baby who can't sit up, can't stand up, who otherwise used to walk and talk, could no longer walk, talk or express himself — if you ask people to evaluate that conduct and say, "What do you think of that?", they would have to say, "Well, that just is not true, that that baby is healthy. It is not true that that baby is better. It is not true that that baby isn't sick." They would look at that, and they would say, "Yes, that is what is happening down here."

THE COURT: The truth or falsity is not the issue.

MR. CHRISTENSEN: Sure. I think it is, Judge, within secular evaluation.

THE COURT: But we have got to get there first. The first question we have is whether or not this is a statement of a sincerely-held religious belief. Your answer is: "No, it is not a question of a healthy baby. How can that be a statement of a sincerely-held religious belief?"

MR. CHRISTENSEN: I'm sorry. I didn't understand that.

THE COURT: Okay. You are saying that these [95] statements on their face are susceptible to creating a factual question as to whether they are secular statements or statements of a sincerely-held religious belief. Given what has been provided to me about Christian Science and what some of their tenets are, the statement that "No medical treatment could offer some solution

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to Matthew's health problem" seems to me to be clearly one of a sincerely-held religious belief, and absent proof to the contrary, I don't see a factual question.

MR. CHRISTENSEN: Mrs. Ahearn looked at this child the day before he was taken to the hospital and said it looked like a perfectly normal baby to her, that when you take a look at — I don't think you can look at an expression —

THE COURT: I haven't granted summary judgment on a statement of that nature, "a perfectly healthy baby to me." That sounds like a specific diagnosis. I have not ruled on Roman numeral "III," Arabic "2," or Roman numeral "I," Arabic "3," yet. I am only on 1, 3, 4, 5 and 6 after Roman numeral "III," and neither one of those do I find is a specific diagnosis. So don't talk about those yet. I am dealing with 1, 3, 4, 5 and 6.

Okay. I am still imbedded in my analysis that I need more than just statements to create a factual question as to that, and I will grant summary judgment on Roman numeral "III," 1, 3, 4, 5 and 6.

[96]

Okay. Let's go to Roman numeral "IV," Arabic "2," through d.

If a statement is coming directly from the Church, doesn't that at least create some kind of presumption it is a statement of a sincerely-held religious belief?

MR. CHRISTENSEN: Well, I don't know that it does. I don't why it should, particularly. If they make a representation that, as a matter of fact, a practitioner can determine when the child is not progressing, I don't know why that, in and of itself, sounds like or smacks of religious belief.

THE COURT: I agree with you. I am not so sure that is a correct statement I just made. The bigger problem I have as to these allegations, they all concern the health ministry, or whatever you want to call it, that you claim is provided an agency office of the Church, because you claim an agency relationship here. It seems to me, on its face, that is a statement of a church

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tenet — "This is what our health ministry in the Christian Science Church can do."

MR. CHRISTENSEN: Well, what it is, it is — I don't necessarily view it that way, I can understand why the Court asks the question, but essentially, as long as you keep starting with the premise that you are dealing with a religious activity, then you are going to end with the conclusion that it is a religious activity. The premise that I start with is [97] that they have a health-care system here that is alternative to and in competition with another health-care system, called medicine; and, just like any other health-care system, they charge money. They charge at about the same rate the doctors do — and least, I have understood that was the original concept that was involved here — and they set it up, offer it to the public at large. You have heard it all before, but it is true. This is the program; this is the schedule; this is the scheme; and they represent that the practitioner could determine when the child is not progressing. Now, ordinary people are going to read that, and what they are going to think is, "Well, is my baby well or not?" And if there is a representation that I should rely on, somebody is going to tell me what I am concerned about, which is not their religious beliefs. I am concerned about the result — "I want my baby cured."

To me, this approach that keeps coming in all of it — and this is why I think it is secular, because we are not saying that they didn't pray hard enough, if that is what they did; we are not saying that they didn't believe hard enough, if that is what they did. What we are saying is that they took a job to cure a baby, and they didn't do that. The practitioners couldn't tell, even though it was represented that they could, whether a child was not progressing. They, as a secular fact, couldn't and didn't, and that is going to be abundantly true; and as to each of these, to offer the public a system [98] of healing that ignores all the evidence of disease is not a reasonable approach, and those are all misrepresentations that are against the Church.

Now, I know the Court wants to start the conversation by saying, "Well, isn't this a representation of a sincerely-held

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religious belief?" I am going to take the same position. I think the Court is starting at the wrong place. I think the Court has to look at what happened in the real world and then go back and take a look at it from the other side. I can't add anything more.

THE COURT: You are saying then that there are particular consequences that flow from a statement of intent once a statement is made. I don't see that it follows. You are saying, "Judge, here is the statement, and here is what has happened as a result of the statement. Therefore, it is a secular statement." I don't see how we get around that.

MR. CHRISTENSEN: That is the thing. You start with the statement. That statement ought to be able to be appreciated for its face value. I am supposed to now guess that when you say, "I am going to heal you," that it doesn't mean "I am going to heal you"? When you say, "Hey, I have got this system of healing people and of taking care of people and of curing people," I am supposed to say, "Well, that isn't what that means"? Why not take it on its face value?

THE COURT: Well, *Ballard* says that if it is a [99] statement of a sincerely-held religious belief, you can't use it civilly against somebody for imposing civil liability. If the defendants are prepared to put on evidence that "Here are the basic tenets of the Church. Our idea of healing is for prayer, except for the limited exception of broken bones or natural process," it creates a question in my mind about the consistency of it, which isn't very important here; but, nevertheless: "We are going to put this on, completely consistent with our church doctrine, everything we claim here. You give us one iota of evidence why this is not a statement of a sincerely-held religious belief." Your response is, "Look at the impact."

MR. CHRISTENSEN: No. My response is: Look at the facts. We start with the very first, and we are right back on I-1, where we were awhile ago. We start right back there, and I say: take a look at what happened in this case. After you have taken a look at what happened in this case, all of these facts, all these statements of secular implications, it is not only the result that

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determines the evaluation, but it is the fact that they have set up a system that says they are going to take care. We are coming back to what I talked to you about earlier, but why do they get to engage in activities and conduct that would not otherwise be protected? If we would admit this is tortious conduct, if we would admit you assume a duty to heal or assume a duty to treat and, under anybody's [100] definition, you are not doing a very good job, how does that then become acceptable conduct or protected conduct? It has got to be by virtue of them claiming that guard, and then, as I say, I think it could be a defense. I think the jury should hear it. The jury should decide what the significance and impacts of all this evidence are, and if they like the defense — and I think that the jury should be well-informed of the First Amendment protection —

THE COURT: You say, "We have got the statement, and we have got the context, and, Judge, that creates a factual question." What is there about the context that lends support that it was a secular statement? I see nothing in the context that does that.

MR. CHRISTENSEN: What could be more secular?

THE COURT: You are saying the nature of the statement, that it concerns the health of the child; is that right?

MR. CHRISTENSEN: The facts in this case are secular facts. I mean, their baby died, and that is the truth. All of these facts are actually what happened as I was talking with you. Basically, what we are being told is that we can't tell a trier of the fact what happened; we can't tell the jury the truth, because there is religion involved. That isn't the way it should go. I think the way it should go is that we bring these facts to the jury, facts that have to deal with the real life and real death of Matthew Swan, and let that jury [101] determine whether or not the conduct associated with those facts is acceptable conduct in our society.

THE COURT: Acceptable for a reasonably-prudent person?

MR. CHRISTENSEN: Yes.

THE COURT: You have gone around the circuit somewhat, but I still think it cannot be analyzed other than basic tort law is

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reasonable under the circumstances. I just don't think you can divorce yourself from the fact that this was Christian Science conduct.

MR. CHRISTENSEN: One answer?

THE COURT: Certainly.

MR. CHRISTENSEN: Even basic tort law doesn't excuse a mentally-incompetent person from being inebriated in terms of reasonable and prudent conduct.

THE COURT: I know, but the First Amendment excludes, to some extent, the religious person.

MR. CHRISTENSEN: I am offering the Court a method by which that First Amendment and its protection can be continued, and that is to let the defendants claim the protection of the First Amendment in a court of law and be excused and given a no cause of action if people reasonably evaluate their conduct as being —

THE COURT: Why don't we instruct the jury: "If you find that the plaintiffs did not have probable cause, did not [102] have sufficient facts to support this warrant, we don't want you to consider this evidence"? We are still dealing with constitutional protections, because I think the founders were worried about application by the general citizenry, or lay people, that come to sit on juries, that there are certain things we don't give to juries. I am a strong believer in the jury system, but at the same time there are a number of things because we want to protect minorities, that we don't allow to go to the general feelings of the community that we hope are evinced in those things we allow juries to decide.

MR. CHRISTENSEN: But the analogy fails when other activity is like a similar activity. You don't have a magic byword. This takes activity that is otherwise susceptible of judicial judgment, and, by virtue of a phrase, by virtue of a title, by virtue of a label of a hat, that activity can no longer be evaluated.

The reasons for protections against unreasonable search and seizure are well established with respect to protecting rights and circumstances other than the particular case. We protect everybody's rights by protecting an individual's rights; but here we

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make up a whole new rule, make up a whole new system that says, "If you didn't have your hat on, you are in trouble. You have got the hat on."

THE COURT: Just like we have a whole set of rules for journalists against charges of libel and slander. You have [103] got to prove a lot more against them than anybody else. Why? The First Amendment. We have whole lots of areas where there are whole lots of other things and other requirements that plaintiffs have got to prove where you have constitutional obstacles.

I agree with you that without the religious aspect we probably would have impaneled a jury a long time ago and been trying this case, but that is the central rule of law I need to apply in this case.

Anything else to be said before I rule on Roman numeral "IV," Arabic "2," a through d?

MR. CHRISTENSEN: Just this, and I am sure the Court knows it, but juries do decide criminal conduct when there is religion involved. Juries are frequently permitted to do that.

THE COURT: Conduct, right. This is misrepresentation, sure, free speech.

MR. CHRISTENSEN: Again, this is conduct. Conduct is the implementation and application of a health-care system and the particulars of that system as they went to let Matthew die.

THE COURT: Anything else?

MR. CHRISTENSEN: No, your Honor.

THE COURT: Once again, I think, to be consistent with the First Amendment freedom-of-religion clause, it is the plaintiffs' burden to, at a minimum, not even reaching the [104] question Mr. Christopher, I am sure, is eager at some point to discuss — probably not if I rule for him — but the question: If there is a factual question, given the First Amendment, can I give it to the jury?

It is clear to me the first analysis is: Is there a factual question upon which a fact finder can find these are not religious statements? Given the facts the defendants have indicated they have testimony they are all statements of sincerely-held religious

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beliefs and the plaintiffs have only indicated they are statements that, upon their face, are in line with the one context that they think creates a factual situation, I do not think that is sufficient to overcome the First Amendment protection. Therefore, I will grant summary judgment on Roman numeral, "IV," Arabic "2," a, b, c and d.

MR. CHRISTENSEN: You are including my application of plain conduct, as well?

THE COURT: I don't see how any misrepresentation claim which is a misstatement can be conduct.

MR. CHRISTENSEN: I understand.

THE COURT: If I am correct, according to my ruling we are down to the question of specific statements of diagnoses. Before we get to that, I want to make sure I haven't missed anything.

MR. CHRISTENSEN: You haven't, Judge.

THE COURT: You all may have surmised that is the [105] one that gave me the greatest difficulty.

Can anybody think of anything else that hasn't been discussed?

MR. CHRISTENSEN: No, your Honor. I don't believe so.

THE COURT: All right.

As I read the brief, it has been indicated that the plaintiff plans to put on evidence that one or both of the individual practitioners made statements of direct diagnosis. As I recall one, they said something to the effect: "Don't worry. He is just teething," or "cutting a tooth." Another time, something to the effect: "Don't worry. It is roseola." Another one, something about paralysis, I remember. What is that statement?

MR. CHRISTENSEN: That they were working on a claim of paralysis or a claim that he doesn't have paralysis. That had to do with episodes of — well, they say he doesn't have paralysis. It was Mrs. Adhearn who said: "He doesn't have paralysis, because if he can move his toes, he doesn't have paralysis."

THE COURT: All right. The statement is "He does not have paralysis"? Is that somewhat accurate?

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MR. CHRISTENSEN: I think that is all.

THE COURT: What have I missed, what other statement?

MR. CHRISTENSEN: The statement that "There is [106] nothing contagious here," that "There is nothing contagious."

THE COURT: "Not something contagious."

Have I missed any?

MR. CHRISTENSEN: No, your Honor. That will include them all.

THE COURT: I see we have got four separate claims that they made statements of a specific diagnosis: One "not paralysis," one "roseola," one "teething or cutting tooth," and two "not something contagious."

Does that cover all the allegations of misrepresentation based on any specific diagnosis?

MR. CHRISTENSEN: Yes, your Honor.

THE COURT: Okay.

You are going to get a chance to talk, Mr. Christopher. Let me see if I can formulate the questions I want to ask you.

We had some discussion this morning which concerns me in this area: It seems to me that in a religious context — and, obviously, I view it as one based upon my previous rulings — that it is possible to make a secular statement. Now, I don't know exactly how the evidence is going to come out, and it may be that, after it is all in, I may take even these specific diagnoses for statements of a sincerely-held religious belief. Maybe, before I start impaneling the jury, I have got to get a little more information on the context of the [107] statement, but it seems to me that we may have a factual question. For example, if one of these defendants said, "Don't worry. He is teething," or "cutting teeth," and if the context is it was after they had looked at him and somebody had come to the conclusion that it was a statement made on observing a sick child, that one might conclude that it was not the statement of a sincerely-held religious belief, but, rather, a secular statement, for a number of reasons: one, maybe because that is what they truly believed; two, that it was a secular

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statement made to induce the Swans to stay in the fold of the Christian Science Church.

Before we get to the question of whether or not it is a factual question that I can figure out going to the jury, it seems to me, possibly on its face alone, the statement of a specific diagnosis may create a factual question of whether it is a secular statement or a statement of a sincerely-held religious belief.

(Mr. Christopher shakes head.)

Why not?

MR. CHRISTOPHER: Because we have been through discovery. This case is three years old. We have taken the depositions of both the parents and both of the practitioners. Those statements have been thoroughly explored with each of them, and there is no question about the religious context in which these statements were made.

[108]

THE COURT: Before you go much further:

You dispute that, Mr. Christensen; right?

MR. CHRISTENSEN: Yes, your Honor. I would rely on my previous argument that it is a continuation of secular activity, I believe.

THE COURT: Well, that is not going to be sufficient.

MR. CHRISTENSEN: I know.

THE COURT: In this area, these statements are ones I don't know on the context, but on their face alone there might be a conflict whether they are religious or secular in nature.

What I want to do is get down all the claims of actual diagnosis, and I would require the defendant and suggest that the plaintiff, over the evening — and maybe if he wants to come in a little later than nine o'clock, although I would like to get started at nine, but I understand you didn't know where I was going and how I was going to approach this — I would like a factual synopsis of the discovery as to each one of these four areas, so I can see what the context was, because, as I indicated, if the situation was that one of the individual defendants went over,

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looked at this child, looked in the ear or whatever, like somebody who is acting like a doctor does, walks over and makes a specific diagnosis, I might be inclined to think that creates a factual question. On the other hand, I can see a number of factual questions as to [109] the nature of remarks. I might have a friend looking at my two-year-old who would say something that I would not naturally rely on or think that it is really a diagnosis he is making. So the context of this is important to me.

I will hear whether anybody has problems with the procedure, but I would like to adjourn for the day. Talk about what time you will come back, and give me all of what discovery indicates for witnesses you know you are going to call that have not been deposed or interrogatories covered. And plaintiff, too. Give me as many facts as you can, so I can understand what the context is going to reveal at the time of trial.

Does everybody understand what I need? Does anybody have any problems with the procedure?

MR. CHRISTENSEN: No, your Honor.

THE COURT: Do you have time before nine o'clock, or would you like to make it later?

MR. CHRISTENSEN: Later.

THE COURT: I have four sentences and two motions tomorrow?

THE CLERK: Right.

THE COURT: All right. What time do you want?

MR. CHRISTENSEN: Ten o'clock.

MR. CHRISTOPHER: That is fine.

THE COURT: That is fine. Okay. Court is in [110] recess until ten o'clock tomorrow morning.

(At 3:56 P.M., an adjournment was taken to Wednesday, September 7, 1983, at 10:00 A.M.)

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STATE OF MICHIGAN }
COUNTY OF WAYNE } SS

I, Earl A. Foucher, an official court reporter for the Wayne County Circuit Court, do hereby certify that I reported stenographically the foregoing proceedings had and testimony taken in the matter of ALAN A. MAY, Personal Representative of the Estate of MATTHEW SWAN, Deceased, and DOUGLAS SWAN and RITA SWAN, Individually, Plaintiffs, v. JEANNE LAITNER, JUNE AHEARN, and THE FIRST CHURCH OF CHRIST, SCIENTIST, in Boston, Massachusetts, a foreign corporation, Jointly and Severally, Defendants, Civil Action No. 80-004-605-NI, before the HONORABLE RICHARD C. KAUFMAN (P27853), Judge of the Third Judicial Circuit, on Tuesday, September 6, 1983; that the same were thereafter reduced to typewritten form under my direction and that the foregoing is a full, true and correct transcription of my machine-shorthand notes.

(s) Earl A. Foucher CSR-0017
OFFICIAL COURT REPORTER
CERTIFIED SHORTHAND REPORTER
REGISTERED PROFESSIONAL REPORTER

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[1]

**STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE**

ALAN A. MAY, Personal Representative
of the Estate of MATTHEW SWAN, Deceased,
and DOUGLAS AND RITA SWAN, Individually,
Plaintiffs,

-vs-

No. 80-004-605 NI /

JEANNE LAITNER, JUNE AHEARN, and
THE FIRST CHURCH OF CHRIST, SCIENTIST,
IN BOSTON, MASSACHUSETTS (The Mother
Church), jointly and severally,
Defendants.

Proceedings had and testimoney taken in the above-captioned matter before the Honorable RICHARD C. KAUFMAN, at 18th Floor, City-County Building, Detroit, Michigan, on Wednesday, September 7, 1983.

APPEARANCES:

**CHARFOOS, CHRISTENSEN, GILBERT &
ARCHER, P.C.**

4000 Penobscot Building
Detroit, Michigan 48226

(By David Christensen, Esq., Jody Aaron, Esq., and
Sharon Lutz, Esq.),

Appearing on behalf of the Plaintiffs.

HONIGMAN, MILLER, SCHWARTZ and COHN
2290 First National Building
Detroit, Michigan 48226

(By William Christopher, Esq.),

Transcript of September 7, 1983

Appearing on behalf of the Defendant The First Church
of Christ, Scientist.

[2]

HELM, SCHUMANN & MILLER

1846 Penobscot Building

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(By Donald J. Miller, Esq.),

Appearing on behalf of the Defendant Laitner.

**KITCH, SUHRHEINRICH, SMITH, SAURBIER &
DRUTCHAS, P.C.**

2030 Buhl Building

Detroit, Michigan 48226

(By Richard Suhrheinrich, Esq.),

Appearing on behalf of the Defendant Ahearn.

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Detroit, Michigan

Wednesday, September 7, 1983

THE COURT: Swan, et al., v. The Church of Christ, Scientist.

MR. CHRISTENSEN: Ready, Your Honor.

MR. CHRISTOPHER: Ready, Your Honor.

THE COURT: Okay. Come forward.

I think we're all aware that when we left off yesterday there was still one category of allegations that I have not ruled on pursuant to DCR 117.23 and the Defendants have filed a lengthy memorandum and exhibits with respect to that issue.

Have you received a copy of that, Mr. Christensen?

MR. CHRISTENSEN: Yes, I have, Your Honor. One was delivered this morning.

THE COURT: Have you filed a written response?

MR. CHRISTENSEN: No, I haven't, Your Honor. I'm prepared to.

THE COURT: Well, I have read it, and I must admit I think there is some persuasive force in the argument that the diagnoses were part of the [4] religious context.

Before I get to that, I think I'm even more impressed—if that's the right word—by some of the writing of your client. I guess it's called "Strawberry".

MR. CHRISTENSEN: "The Last Strawberry".

THE COURT: "The Last Strawberry"—which would seem to me to have to be contradicted on the stand at the trial in order to have even a question of fact as to reliance.

Maybe you want to speak to that first.

MR. CHRISTENSEN: Yes. I'd be happy to, Your Honor, because you know, there is—to set a background, if the Court was impressed by that, the Court also ought to be impressed by the citations of Mary Baker Eddy. To this extent, there is an enormous capacity in the Christian Science religion to have words

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mean something different than what they say. There is no sickness, there is no matter, and literally to invite this Court then to begin to analyze some of the things that Rita Swan was saying in July and August, and later when she was drafting letters and trying to put together her thoughts on this case, means, I think, Judge, that you have to take a look at what she's saying in the context of where she came from. She came from a lifetime of learning that [5] words don't mean anything. But the truth of the matter is we're not here, I think, according to the Christian Science teachings, because this would be a false impression that there is really anything wrong going on; and really, I appreciate it, I'm in the same dilemma, because if you read those words, those words make it sound like, from our view, she had an understanding of what was going on.

Now, knowing what this Court has to do, and knowing what this Court has to decide, let me only say this: The significance of these misdiagnoses in the context in which the Court wants to discuss it is such that I can tell this Court that the language itself may not have been relied on. That is to say, roseola may not have been relied on as roseola; cutting of teeth may not have been relied on in the sense that she herself was not of that impression.

What's significant in this case is that all of these diagnoses were representations effectively to Rita Swan, a member of the Christian Science Church, to lead her to the conclusion that, what? Nothing wrong is going on. And it's in that context. And if we have to discuss this case, as the Court has set the parameters, that is, to begin with, sincerely held religious beliefs, [6] and do not find the secular aspects of this context, then I'm not going to be able to convince the Court.

I think that if the Court would ever let these facts be discussed as facts in the context of a trial, I think that this Court would be impressed that there was reliance in fact not on the specifics of that language, but in the context in which it was offered; that you don't have a medical problem. Stay away from medicine. Whatever it is, Christian Science is taking care of it.

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So in that context, Judge, you may—and I think that you could be invited to think along those lines when you look at some of the writings of the Christian Scientists. In that context, given the totality of the facts in this case, you might very well find that they did in fact rely on a representation of a diagnosis that was different. Not the specifics, but more generally speaking.

THE COURT: Well, if I understand you correctly, you seem to be saying that these statements of diagnoses—and I use that term loosely, because I know you don't think they were really diagnoses—but these statements were part and parcel of the whole context that was relied upon.

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MR. CHRISTENSEN: That's true.

THE COURT: And that these statements were really of no different character than the other statements.

MR. CHRISTENSEN: No. They were of different character, Judge. They were. I mean, I would sincerely offer that they are different character.

What they did, in that sense, is that they were recitations of medical conditions. They were recitations of medical conditions that in some instances were also considered not to be situations, but they were all given so that the Swans would have something that sounds like medicine, something that is medicine, but more often, but more importantly, be given a condition that is more serious.

Now, the specifics of whether or not she knew it was roseola or not is not so important as the message that was given.

The message was that he had a condition. The real message that was heard is that this boy is sick. You know that. But he has a medical condition that isn't serious. And that is, that was the import of the diagnoses.

THE COURT: Why is that not a fair reasoning, Mr. Christopher?

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MR. CHRISTOPHER: Because Rita Swan knew that these practitioners had no knowledge of medicine, had no ability to diagnose, were not supposed to diagnose, and she wasn't accepting it for that purpose.

I think what Mr. Christensen said earlier is accurate; that she was taking this in the context of the whole conversation; that disease isn't real, that disease is a sign of inharmony with God, and that the only effective method to deal with inharmony with God is Christian Science. That's exactly the context that these statements were made and were accepted. And Rita Swan and Douglas Swan have both testified that they understood that and that they accepted them in that context, and you cannot take these statements in isolation and try to put a label on them — they are secular, they are medical — because the whole basis for the relationship was spiritual, and the Court has to consider that the fact that these members of the Christian Science faith came to these practitioners, called them on the phone and sought Christian Science treatment. They didn't seek medical advice. They didn't seek medical treatment from them. They asked for Christian Science treatment.

Not only that, but they witnessed on several occasions the actual Christian Science treatment [9] that was being given and they approved of it; and in fact, Doug said that's what I want, that's what I believe in.

So there was no doubt in their mind what the relationship was; what it was they were asking for; what it was they were getting; and what it was that they accepted. And in that sense, there can be no doubt as to the context in which all of these things were said. And for that reason, I don't believe that it's fair to say that somehow these words suddenly had a different meaning from all the other words that were said between the parties. And look at what the parties did. Look at what the parents did.

Now, when one practitioner said I am working on a claim of paralysis—and in Christian Science jargon that means I am praying for the inharmony, the disharmony in Matthew of paraly-

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sis. Did she take Matthew to the hospital because he was paralyzed? No. Certainly, she didn't. She continued to seek and receive Christian Science treatment.

Now, I don't think that Mr. Christensen would even suggest that paralysis is an inconsequential disease or that rheumatic fever is inconsequential. So it's quite obvious that these parents did not take those words in any secular sense. They accepted them in the [10] sense that they were offered, in a spiritual sense. I don't think there is any question about that.

THE COURT: I guess that raises another question, or the same question, from my reading of the excerpts from Mary Baker Eddy, where she seems to be saying that a practitioner who is in the place of the individual Defendants in this case—I don't know if in every situation, but in a lot of situations—needs to understand what the claim is of the illness—I may be very clumsy in my working of this— but in order to know how to tailor the prayer, that if she thinks it's roseola or paralysis, or whatever, that the practitioner has to have some idea of what kind of label it has in order to tailor prayers, and although I know you didn't agree with my analysis on my previous ruling, assuming that's correct, in my mind I then have the analysis that if that is what the teaching is all about, what evidence is there that the statements about the specific diagnoses were not part of determining the claim so that prayers could be tailored.

MR. CHRISTENSEN: Okay. This, Judge. If you look at this from the upside-down perspective of Christian Science, I'm going to lose every time. I'm not going to be able to tell you that Christian Scientists [11] don't look at the world in a most convoluted form, because they do.

What I'm saying is that the perspective ought not to be from the eyes of the Christian Scientist, but rather that the perspective ought to be from the eyes of what other normal, reasonable, prudent individuals would look at it.

THE COURT: Doesn't that go against at least what I thought we had agreement on, at least what I think the law is,

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that the tests of whether something is sincerely held, a statement of a sincerely held religious belief is purely a subjective test?

MR. CHRISTENSEN: And I have never disagreed with you and I'm not going to disagree with you yet, Judge and as long as they sit in their little cubbyholes and think that, I think they ought to be entitled to do it. But this court knows full well what we're asking to do is to have this Court understand that that's an exception; that we're not dealing with statements or beliefs that are sincerely held, but rather, we're dealing with activity that emanates from this belief that brings on society a system of healing that allows small children to go without medical care. And what we're asking this Court to do is, if the Court indeed finds [12] that this is an expression of religious belief, then minimally to cut out a small exception for innocent children. But more generally, I'm asking the Court not to say and not to find and not to conclude that this activity which they call prayer, or they call sincerely held religious belief, is not indeed that, but rather it is activity that has impact upon the secular world and had real impact upon a 16 month old baby, and as long as we're going to have the perspective that the Court has, I can't tell you that they don't sincerely believe those things, and to ask me to do that is —

THE COURT: (Interposing) I'm not asking you to tell me to believe them, but I'm asking you to give me some evidence from which a factfinder can conclude that.

MR. CHRISTENSEN: And I'm saying, Judge, that I can't make these Christian Scientists admit that they're wrong, I guess.

THE COURT: Two responses. As far as carving out exceptions for small children, I think I did make some comments on that. I think if there ever was a place, that that might be a good place to start. I don't think it's the trial court's place to start doing that.

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The second part, I wonder whether or not this is protected by the First Amendment, by which we need an exception. I still hear

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you saying, and maybe it's because my simple mind can't understand it, your argument well enough, that somehow looking at the results of the reliance on a statement is somehow relevant to a determination of whether the statement was one of a sincerely held religious belief. I keep hearing you say that. I don't know if you're saying that or not; but if you are saying it, I don't understand it.

MR. CHRISTENSEN: Well, I think I'm saying something like that. I don't have it written down. But yes. What I'm saying is this: That I don't think that you can look at — you're looking at the statements. I'd say we have to look at the activity. We have to look at what's going on, and what's going on is much more than just statements. What's going on is a system of, an offered system of health care by practitioners who, incidentally, Judge — and I think the record is, I don't know whether the record is clear on this or not, but these practitioners in the secular sense can certify somebody as being disabled without knowing anything about medicine. They, in some states, are entitled to Blue Cross-Blue Shield reimbursements. I think that's [14] in the discovery that has been done. That when you have that type of reality, that that goes beyond the mere concept of a sincerely held religious belief, but rather, you have an activity. You have a system that is being developed that cannot be viewed in the sole confines of belief; that because of this belief something is being done. A competitive system of medicine or a competitive system of curing, I should say, is being encouraged.

THE COURT: Isn't that really saying that the law should be, and you claim it is, that certain activities should be deemed inherently non-religious and statements or conduct in those areas will not be protected by the First Amendment? Isn't that what you're saying?

MR. CHRISTENSEN: I'm coming close to saying that if it's for children — and understanding that, I don't, I guess I am.

THE COURT: Assuming that's what you're saying.

MR. CHRISTENSEN: And for children. Close to that.

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THE COURT: Wouldn't some legal case law support be necessary to show that there has ever been a case that has ever carved out an area that cannot be considered religious? And I'm not aware of such a case.

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MR. CHRISTENSEN: Well, Judge, it seems to me that what has been offered as religious belief, if we go back to polygamy activity, or if we go back to —

THE COURT: (Interposing) No case has ever said you can't believe in polygamy. It just says you can't have the conduct.

MR. CHRISTENSEN: And I'm saying, and I'm telling this Court that they can believe that illness is disharmony. They can believe that. But don't set up a program that lets small children suffer the consequences of that belief. Don't impose that without a consequence, without a legal consequence. And I even said, as I said yesterday, I even said that that, I'm not suggesting that that could not be a defense in a court of law, that they could come in and say that's the way we were doing it, that a jury could one day decide on whether or not they could be exculpated for such activity.

THE COURT: Okay. Anybody got anything else they want to say before I rule?

MR. CHRISTENSEN: No, Your Honor.

MR. CHRISTOPHER: No.

THE COURT: So that the record is clear — and I assume there is good chance that there will be [16] an appellate review of most, if not all of my decision in this case—I think the Pleading that was filed by Plaintiff, allegations of negligence and misrepresentation will be helpful to them, because all my rulings have been geared to that in discussions, have either talked about one in specific or in discussions have talked about a number of those, and as I did with all my rulings, I have said exactly on which ones I granted summary judgment and what discussion related to that. I think it should be clear that my ruling now relates to roman numeral one, arabic three, and roman numeral three, arabic two,

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and I think it's clear that this is the area that has caused me more concern and more difficulty in making a decision than the other ones, because I do believe that even in a religious context, a secular statement could be made that could be the basis of imposing civil liability.

My analysis of whether or not the diagnoses or the claimed inaccurate diagnoses made in this case, whether or not there is a question of fact whether they are secular, I will take a similar analysis as the one I used in my other rulings on summary judgment; that is, there is evidence proffered by the Defendant, at least evidence of admissible nature, that suggests they are statements of a sincerely held religious belief. As [17] the Plaintiff indicated to me, any admissible evidence could create a question of fact that they weren't.

Frankly, before I read Defendant's brief and response that I received today, I was inclined to believe that, almost on their face, a statement of a specific diagnosis could create a question of fact as to whether it is a secular statement made within a religious context, could be the imposition of civil liability, or is merely another statement of a sincerely held religious belief within that religious context. Given what's in the brief and the teachings of the Christian Science Church as reflected by what I understand is their most important, if not their only, speaker of doctrine, Mary Baker Eddy, which to some extent I have to do to decide whether or not there is a question of fact, it seems to me there is much support for the claim that in order to pray effectively by a person like the individual defendants, there has to be some idea and labeling of what there is, at least a claim, so that the prayers can be tailored.

Consequently, I do see evidence that would be offered by the defendants that would, if briefed, establish that these were statements of a sincerely held religious belief.

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Now, I must determine, as the plaintiff showed me, the evidence of an admissible nature to bring that into question.

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Again, what has been proffered is really asking either for an exception that statements involving the health of children should never be considered religious and should always be secular, or that somehow the context and the statement itself create the question of fact.

Here again, as I ruled previously, I don't see the admissible evidence that will bring into question whether or not any of these statements were other than statements of a sincerely held religious belief.

For that reason, I will grant summary judgment on this final claim also.

Before you leave, though, I want to indulge myself in my own postscript to this case.

I have put a lot of time in this case. I have tried to find those principles of law that I think, as a Judge, I must apply. At the same time, I have a philosophical human response to this case, and having ruled on all the issues I want to make a few comments about this case, the First Amendment, and our society, and it is this: That the First Amendment of the United States Constitution has probably been [19] the vehicle for more freedom in a society than any other historical attempt at government, but freedom costs. Freedoms flowing from the First Amendment have significant costs in our society.

The First Amendment forces our society to pay the human costs associated with negligent journalism that occurs without malice. The First Amendment forces our society to pay the human costs associated with the espousal of philosophies that cause severe disruption and even violence in our society, and the First Amendment, as I have ruled in this case, costs parents who lose their child as a result of adherence to religious dogma the right to attempt to recover damages from those whom they claim are directly responsible for the death of their child. That is a huge cost for freedom.

At the same time, as I take this action in this case, I must sincerely commend the ability, advocacy, and courage of the Plaintiffs and their attorneys for bringing this lawsuit.

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I assume, being the excellent attorneys they are, that Plaintiffs' attorneys realized that this type of case would be an uphill struggle. I believe that the bringing of this lawsuit, and lawsuits of this type, forces our society through its course to see [20] exactly the costs associated with our First Amendment freedoms and how they impact in a given context.

Perhaps our appellate courts will say that this cost is too great in a given situation and create more limited exceptions to some of our First Amendment freedoms.

In any event, I believe all the parties in this case can hold their head high in recognition that they have been involved in a case that helped strengthen our governmental system by testing some of its important principles, and I thank you very much.

MR. CHRISTENSEN: Thank you, Your Honor.

MR. CHRISTOPHER: Your Honor, I have an Order which I have prepared and which I'd like shown to Mr. Christensen, and I'd like the Court to examine it.

THE COURT: Do you believe it complies with my ruling, Mr. Christensen?

MR. CHRISTENSEN: I have not read it, Your Honor.

THE COURT: Why don't you take a minute and read it. If you can approve it as to form, it will make my job easier. If you can't, I will come back and decide what the wording should be. Okay?

MR. CHRISTOPHER: All right.

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CERTIFICATE

I, Claudia Burton, do hereby certify that I reported stenographically the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth; and I do further certify that the foregoing transcript, consisting of twenty (20) typewritten pages, is a full, true and correct transcription of my said stenographic notes.

(s) CLAUDIA BURTON, CSR-2615
Court Reporter

Date: 9-16-83

*Memorandum Regarding Diagnosis***STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE**

ALAN A. MAY, Personal Representative
of the Estate of MATTHEW SWAN,
Deceased, and DOUGLAS SWAN and
RITA SWAN, Individually,
Plaintiffs,

vs.

Hon. Richard C. Kaufman
Case No. 90-004-605-NI

THE FIRST CHURCH OF CHRIST,
SCIENTIST, in Boston, Massachusetts,
a foreign corporation, jointly and
severally,
Defendants.

**MEMORANDUM WITH RESPECT TO ALLEGATIONS
THAT DEFENDANT PRACTITIONERS MADE
DIAGNOSES****I.
INTRODUCTION**

Plaintiffs allege that the Defendant practitioners made "diagnoses" of Matthew Swan's physical condition. Four diagnoses are alleged:

1. that Matthew was cutting a tooth;
 2. that Matthew was suffering from roseola;
 3. that Matthew was not suffering from a contagious disease;
- and
4. that Matthew was not suffering from paralysis.

Certain of the statements that the Plaintiffs now seek to characterize as diagnoses the Defendant practitioners deny making at all. Furthermore, to the extent that the practitioners made any statements whatsoever with respect to the possibilities of

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roseola, contagion, cutting a tooth or paralysis, these were not what Plaintiffs now label as "diagnoses"; that is, efforts to make a determination in accordance with standards adopted by medical science, of a physical or biological cause of a disease. However, for purposes of determining whether Summary Judgment under GCR 117.2(3) is proper, Defendants will assume that the facts as set forth in the depositions of the Plaintiffs and in documents written by Plaintiffs which will be introduced into evidence, are true.

Assuming the truth of Plaintiffs' testimony, the Defendants are entitled to Summary Judgment as a matter of law for four reasons:

First, statements made by the practitioners which Plaintiffs now seek to label as "diagnoses" were made in a religious context and were intended to have a religious meaning. In other words, Defendant practitioners were not providing the Plaintiffs with an explanation of the medical or biological cause of Matthew's illness for purposes of providing medical treatment or making a decision as to whether medical treatment was appropriate. Rather, the statements were either (i) efforts to determine particular concerns or fears that the Plaintiffs had for purposes of focusing the prayer that was to be provided for Matthew, (ii) simply statements in response to comments that Rita Swan raised, or (iii) merely inquiries by the practitioners about Matthew's physical state which they felt might be relevant to the Christian Science treatment by prayer which they were providing.

Second, if, by some stretch of the imagination, it is assumed that these were not statements that were made wholly in a religious context in connection with Christian Science treatment, it is abundantly clear from statements made by Plaintiffs that they did not rely on these so-called "diagnoses" for they knew that the practitioners had no medical knowledge and were not competent to give medical advice. Rather, the Plaintiffs continued to look to the practitioners for Christian Science treatment. They were not

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interested in any medical diagnoses that practitioners might offer nor did they have any intention of acting on those "diagnoses".

Third, even if the practitioners' statements were "diagnoses" and the Plaintiffs were entitled to rely and did rely on those diagnoses, the making of the diagnoses was not the proximate cause of Matthew's death or of any injuries suffered by Matthew. The Swans did not fail to obtain medical treatment for Matthew because of statements by the practitioners concerning roseola, cutting a tooth, contagion or paralysis. Rather, they did not seek medical assistance for Matthew sooner than they did because of their sincerely held religious belief that Christian Science treatment was the best and most appropriate treatment for Matthew.

Finally, even if there were improper diagnoses or misrepresentations, the practitioners owed no duty to the parents to give correct diagnoses. The only duty owed was to provide Christian Science treatment and that duty was fully discharged.

II.**DISCUSSION****1. The Statements Allegedly Made By The Practitioners Were Made In The Context Of And For Purpose Of Their Christian Science Treatment Of Matthew.**

Plaintiffs' allegation that alleged statements of the practitioners with respect to roseola, cutting teeth, contagion and paralysis constitute "diagnoses" is another example of an effort by Plaintiffs to place a label that has medical significance upon statements that were not made in the context of medical treatment, not intended as medical advice, not treated as medical advice by the Plaintiffs, and that relate entirely to a different conception of disease and the treatment of disease than that contemplated by medical science. This is similar to Plaintiffs' tactic of labeling the rendering of prayer to the sick as a "health care system". Such labels obscure the issue rather than clarify it.

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As part of Christian Science treatment by prayer, a practitioner must deal with whatever particular "claim" of disease might be involved in a particular case. This means, simply, that a practitioner must deal with the fact that the patient, or in the case of a child, the parents of the patient, fear some particular disease or the symptoms of some particular disease. This does not mean that the practitioner seeks to determine in any medical sense whether a particular cause or disease is present in order to permit physical or medical treatment. Rather, the practitioner seeks through prayer to destroy the patient's or his parents' belief in the disease or fear of the disease. And, in order to destroy the belief in or fear of the disease, it is often first necessary to name the disease and to deny its existence once named.

Mrs. Eddy wrote in "Science and Health with Key to the Scriptures", the basic Christian Science text (along with the Bible):

"It must be clear to you that sickness is no more the reality of being than is sin. This mortal dream of sickness, sin, and death should cease through Christian Science. Then one disease would be as readily destroyed as another. Whatever the belief is, if arguments are used to destroy it, the belief must be repudiated, *and the negation must extend to the supposed disease and to whatever decides its type and symptoms.*" [Page 413, Lines 12-20] (Emphasis added)

Mrs. Eddy also wrote that the particular Christian Science treatment through prayer may be affected by, or vary with respect to the particular symptoms of the person being treated:

The great fact that God lovingly governs all, never punishing aught but sin, is your standpoint, from which to advance and destroy the human fear of sickness. Mentally and silently plead the case scientifically for Truth. *You may vary the arguments to meet the peculiar or general symptoms of the case you treat,* but be thoroughly persuaded in your

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own mind concerning the truth which you think or speak, and you will be the victor.

You may call the disease by name when you mentally deny it; but by naming it audibly, you are liable under some circumstances to impress it upon the thought. . . .

To prevent disease or to cure it, the power of Truth, of divine Spirit, must break the dream of the material senses. *To heal by argument, find the type of the ailment, get its name, and array your mental plea against the physical.*" [Science and Health, Page 412] (Emphasis added)

Plainly, then, the notion of giving a name or label to a disease, or noting symptoms, is an integral part of Christian Science treatment. That does not, of course, mean that a Christian Science practitioner engages in diagnoses the way a doctor does. The fact that a Christian Science practitioner may chose to go through a process of labeling the disease as part of Christian Science treatment does not transform the practitioner into a physician.

That labeling the disease, if that is what the practitioners did, was part of Christian Science treatment is made abundantly clear by the deposition testimony of the Swans. For example, the Swans recalled that one of the practitioners was working on a "claim of paralysis." In other words, the practitioner was seeking to dispel the fear of this particular disease or the wrong idea created by the disease. Of course, whether Matthew did or did not suffer from paralysis as a doctor might understand the term has no necessary relevance to the need of a Christian Science practitioner to give appropriate prayer in connection with a "claim" of paralysis.

The use of the word "claim" in Christian Science is of great significance. The meaning of that term is explained by Mrs. Eddy in *Science & Health* as follows:

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"Matter and its claims of sin, sickness, and death are contrary to God, and cannot emanate from Him.

(*Science & Health*, p. 273)

* * *

Suffer no claim of sin or of sickness to grow upon the thought. Dismiss it with an abiding conviction that it is illegitimate, because you know that God is no more the author of sickness than He is of sin. You have no law of His to support the necessity either of sin or sickness, but you have divine authority for denying that necessity and healing the sick.

(*Science & Health*, p. 390)

Mrs. Swan wrote in *The Last Strawberry*: "Christian Science forbids medical diagnosis and forbids its practitioners to suggest medical treatment, so we *could not even ask Jeanne [Laitner] for her opinion.*" (page 10). This demonstrates that the Swans recognized the distinction between obtaining a medical diagnosis which, as they say, they "could not ask for", and discussing the labels which might be applied to the disease, which they could and did do.

As the works of Mrs. Eddy also disclose, Christian Science teaches that it is necessary to deal with and allay fears about disease.

"Always begin your treatment by allaying the fear of patients. Silently reassure them as to their exemption from disease and danger. Watch the result of this simple rule of Christian Science, and you will find that it alleviates the symptoms of every disease. If you succeed in wholly removing the fear, your patient is healed. [Science and Health, p 411-412]

The Swans were, by their own admission, very distraught. Many of the practitioners statements were attempts by the practitioners to calm the Swan's fears, particularly of Rita Swan — to try to

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relieve her obvious anxiety. Douglas Swan acknowledged this aspect of Christian Science health in his deposition:

Q: Did you indicate that your wife needed to be relieved from the pressure of giving Matthew constant attention?

A: I did. I think I did.

(D Swan Dep, p. 238)

* * *

Q: On Tuesday evening do you recall a conversation with Mrs. Ahearn in which she expressed the concern that yours or your wife's fears were holding up the whole thing?

A: I know that was the subject of more than one conversation. Whether one of those was on Tuesday or not . . . I cannot say. We had been told that more than once. Usually it was in the setting that "My work is effective but —"

Q: But what?

A: Mrs. Ahearn would say, "My work is effective but your fears are holding up healing."

(D Swan Dep, p 248)

In this context, the practitioners are alleged to have made statements which the parents now characterize as diagnoses. In fact, all the practitioners were attempting to do was calm the fears of the Swans so that their treatment by prayer would be effective.

Furthermore, as the deposition testimony of Rita Swan demonstrates, in some instances, the Swans asked the practitioners whether Matthew might be suffering from particular diseases. Certainly, in the context of Christian Science treatment, it may be appropriate for a practitioner to respond to such inquiries since they indicate that a particular disease is feared. Again, whether or not the disease being discussed is or is not the disease which a

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medical doctor would diagnose is irrelevant. However, the practitioner may find it appropriate to label the disease so that she can allay the fear that it represents, thereby furthering her *Christian Science* treatment of the patient.

The notion now suggested by the Plaintiffs is that the statements made by the practitioners can be interpreted as secular. However, this theory is inconsistent with the obvious expectations of the parties and their response to these purported diagnoses. If the Swans actually believed that the practitioners were making a medical judgment about the disease that Matthew suffered from, they plainly would have expected and demanded a medical response to that disease. For example, if the Swans believed that it was important to know whether Matthew had roseola, they would have also desired to know the medical treatment prescribed for roseola. However, it is undisputed that whatever the medical label for the disease from which Matthew was suffering, the Swans were looking for Christian Science treatment of Matthew, not medical treatment.

Furthermore, there is ample testimony that the practitioners told the Swans that it did not matter what the particular symptoms of disease are. They said that what is important is what Christian Science calls "radical reliance". As Douglas Swan testified:

Q: Do you recall Mrs. Laitner saying that if you're relying radically on God, it doesn't matter what the symptoms are?

A: I believe she did say that.

* * *

Q: Do you recognize that statement as having its source in Christian Science teaching?

A: Yes.

Q: Do Mrs. Eddy's writings refer to relying radically on God?

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A: Yes.

(D Swan Dep, p. 166)

Therefore, it is apparent that whatever discussion of symptoms took place was completely enmeshed in the scheme of Christian Science treatment. A detailed examination of the four alleged diagnoses demonstrates this beyond dispute.

2. Summary Of The Plaintiffs' Deposition Testimony And Documentary Evidence With Respect To Each Of The Four Allegations Of Diagnosis.

A. The "Paralysis" Comment

Rita Swan testified in her deposition that on Friday morning, June 24, 1977, she telephoned June Ahearn and described a severe stiffness problem that she thought Matthew was having. She asked June Ahearn for Christian Science prayer for this problem. Mrs. Swan testified that June Ahearn replied as follows:

"She said, 'Well, I didn't want to tell you this, but I am working very diligently on the claim of paralysis.'"

- By this, Rita Swan understood June Ahearn to be saying that she was praying for Matthew's problem of paralysis.

In a telephone conversation the following Tuesday morning, Mrs. Ahearn related that she had been praying for Matthew well into the previous night and gave Rita Swan some reading assignments from Mrs. Eddy's writings concerning fever and paralysis. Mrs. Swan then continued:

"... on Sunday, in the afternoon, she had said at one point in her conversations, 'Maybe we should just deal with this thing frankly. What are you afraid of?' So I told her about my knowledge of strep throat, that I had had a student whose son had had strep throat. So I threw that out as a possibility and she said, 'No, he does not have strep throat. If he had strep throat, he would not be able to swallow.' Then I said, 'Well, what about paralysis?' But she was the one who had

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first mentioned paralysis on Friday and she said, "No, he does not have paralysis. If he had paralysis, he would not be able to wiggle his toes." So first she claimed that she was working on a claim of paralysis and then on Sunday she said that he did not have paralysis because he would not be able to wiggle his toes if he were paralyzed. Then on Tuesday she was again suggesting this claim of paralysis and asking us to read all references to fever and paralysis in Mrs. Eddy's writings.

She also asked me to read an article called "The Body's Best Friend" in the July 11 *Sentinel*, and she asked me to read approximately from Pages 370 to 400 in *Science and Health*, some major section from the chapter "Christian Science Practice."

(R Swan Dep, pp 245-246)

Finally, on Wednesday evening, during her visit to the Swans' home the day before they took Matthew to the hospital, Rita Swan related the following observations and conversations:

"... while she [June Ahearn] was still standing over the crib and looking at Matthew, she said, "Everything looks lovely now except the head." Then she said "two claims particularly came to my thought. One was paralysis and the other was rheumatic fever," and she talked about how diligently she had handled each of these claims. Doug said something about — he said, "What I was afraid of is so obviously not true now," and I believe he meant that Mrs. Ahearn had healed the paralysis.

Q: He said that in Mrs. Ahearn's presence?

A: Yes, he did.

(R Swan Dep p, 263)

It is obvious from the above colloquy that Rita Swan understood Mrs. Ahearn to be saying that she was praying for

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Matthew's problem which she identified *in her own thought* as paralysis.

To Christian Scientists, a claim of sickness is the equivalent of a claim of sin. When Mrs. Ahearn stated that she was praying for a claim of paralysis, she was stating in Christian Science that she was praying about the sin of paralysis.

The concept of claim and sin were also reflected in the testimony of Doug Swan as follows:

Q: What did Mrs. Ahearn say about Matthew, if anything?

A: While we were in the room with her she said that there was great progress, that the claim of paralysis was one she had been praying on and that clearly had been healed and that she had also thought that she should treat rheumatic fever, I believe it was. There were two claims that had come to her to treat and I believe they were, I know one was paralysis, I believe the other one was rheumatic fever, and she had treated them both very thoroughly and she thought that this thrashing around was proof that he didn't have paralysis.

Q: Did you believe that what she said was true?

A: I believed he was not paralyzed, yes; I did not think he was healed.

(D Swan Dep, p 256)

This testimony demonstrates the clearly religious meaning of the claim of paralysis that was mentioned by Mrs. Ahearn. Mrs. Ahearn stated that she was praying for Matthew and that this was the focal point of her prayer.

In her testimony June Ahearn recalled that Rita Swan was the first to mention that she (Rita) was concerned that Matthew might have become paralyzed.

"She asked if I thought that — she would always have this twisted leading around way — I thought — and then kind of

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put words in my mouth which I didn't say — that maybe Matthew contracted a disease in the pool or maybe he got paralysis in the pool and that kind of thing. Well, I says, we do not believe in all of these so-called diseases and names, Rita, and you should turn your thought and know that he is in God's loving care and all is well.

(Ahearn Dep, pp 76-77)

Therefore, all of the parties testimony is consistent with respect to the religious context in which the paralysis comment was made. For the convenience of the court, the relevant passages with respect to this issue in the depositions and other documents are attached as Exhibit A.

B. The "Cutting a Tooth" Statement

Rita Swan wrote in her manuscript, *The Last Strawberry*, that on Saturday, June 18, 1977, when Matthew first developed a high fever, Jeanne Laitner asked her the question: "Do you think Matthew could just be cutting a big double tooth" (*The Last Strawberry*, p. 2). She then writes that immediately after Mrs. Laitner made this comment:

"I rejected this *suggestion* and recounted all the previous fevers. No matter how grateful we were for those healings and how much faith we had in them, it appeared to me that Christian Science was not getting to the root cause of the problem, but just superficially improving the symptoms."

(*The Last Strawberry*, p. 2) (emphasis added)

Obviously, Rita Swan recalls this "diagnosis" as a *question*, not a medical hypothesis. Rita herself characterizes it merely as a "suggestion". Furthermore, Rita Swan did not believe the statement by Jeanne Latiner to be true. In her deposition she testified as follows:

"... in the Saturday night conversation when we discussed the previous three fevers, it was preceded by her question

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"Do you think Matthew could just be cutting a big double tooth?"

Q: You assured her that you did not believe that was the problem:

A: I did."

(R Swan Dep, pp 67-68)

Mrs. Laitner's testimony at her deposition confirms the obvious conclusion that these statements were not diagnoses. She was asked if there was anything in *The Last Strawberry* that she disagreed with and she replied:

"She says that I diagnosed it as — that Matthew was cutting a tooth and I flatly disagree with that. I often have a general question, I ask parents of a young child, I say, is he cutting teeth. I was not diagnosing it at all. It was just a general question."

(Laitner Dep, p 50)

At another point, Mrs. Laitner testified as follows:

Q: Did you ever, personally, evaluate or take notice of the physical condition of a patient during treatment?

A: You mean by looking at them?

Q: Yes.

A: If I made a house call, of course I would see what they looked like if I was looking right at them. But I am not a diagnostician. I do not endeavor to determine by looking at someone what the state of their health is.

(Laitner Dep, pp 23-24)

The relevant deposition excerpts and other documents with respect to this alleged diagnosis are attached as Exhibit B.

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C. The "Roseola" comment

Rita Swan wrote the following about what is now alleged to be a diagnosis of Roseola in *The Last Strawberry*, pp 6-7:

Then she proceeded to demonstrate her claim of the previous evening, that she had learned a lot about disease through her third-hand contacts with medical doctors. A woman had called her recently about her baby. The husband, who was not a Christian Scientist, insisted that the baby be taken to a pediatrician. It turned out that the baby had roseola. The symptoms were a high fever followed by a rash. "I thought that was kind of" (a pregnant pause) "interesting".

The Christian Science Church has strongly ordered practitioners not to name diseases. They have no medical training. They are supposed to stick with their theology that all disease is unreal to God, that God is as willing to heal one disease as another, they don't need to learn anything from a medical doctor, etc.

Jeanne knew better than to give a diagnosis, but she could not resist exhibiting her knowledge and authority. "It sounded just like Matthew's, except maybe not as severe. The doctor said not to worry about it. It's rather common now. And *I'm trying to know that Matthew does not have a disease called roseola.*"

Logical consistency is not something that bothers a Christian Science practitioner. In the same conversation, she could pooh-pooh my ignorant fears and come up with her own diagnosis.

I knew immediately she was wrong, for I had heard about roseola from Cathy's nursery school teacher. If Jeanne had looked up the word in a dictionary or even thought about its meaning, she would have known better. But a Christian Science practitioner is so convinced of her divine mission that any freakish coincidence which passes by *may be taken*

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as a message straight from God. Jeanne saw a fever blister less than half the size of a dime and thought it was a rash. (Emphasis added).

Several things are apparent from this statement by Rita Swan. First, the practitioner is not alleged to have represented that Matthew had Roseola. What Mrs. Laitner did say was that she was "trying to know that Matthew does not have a disease called Roseola". That is clearly part of her Christian Science prayer. Second, Mrs. Swan states that this was not a "diagnosis" because the practitioner "knew better" than to give a diagnosis. In other words, she understood the practitioner to be acting consistently with Christian Science principles. Third, Mrs. Swan states that she knew that this was an incorrect diagnosis from a medical point of view but she apparently decided not to argue the point because she knew that the practitioner believed that her knowledge was divinely inspired.

Jeanne Laitner, when asked if she disagreed with Mrs. Swan's statements, testified as follows:

"She says that I diagnosed it as . . . roseola. That was merely a comment about another case. I was not diagnosing Matthew in any way as having roseola. . . . I would take exception to the tone of *The Last Strawberry*. . . .

Q: Can you recall the context of your comment regarding roseola as it related to another case?

A: Merely that a child had had a rash and the mother had been very disturbed and the father who was not a Christian Scientist had taken the child to a doctor and he had said that it was roseola that the child had.

Q: What would lead you to make such a statement or comment in this case?

A: . . . She was disturbed about a rash around Matthew's mouth. But I was in no way diagnosing, I was just merely citing that other case.

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Q: This was sort of a reassurance to her?

A: I would say I was just reminded of it and commented about it.

(Laitner Dep, pp 50-51)

The relevant testimony and documents are attached hereto as Exhibit C.

D. The "Contagion" comment

In her deposition, Rita Swan described the following conversation with June Ahearn on Monday, June 27, 1977:

"Then Doug brought up the point about reporting the disease to the Public Health Department.

Q: What did he say?

A: He said, "This might be a contagious disease and, for the protection of the community, it should be either medically diagnosed or reported."

Q: What did she respond to that?

A: She quoted Mrs. Eddy's statement on Page 370 about a medical diagnosis and how it tends to induce disease.

Q: That is from *Science and Health*?

A: Yes, and Doug said, "Do you know what I mean by 'reporting the disease to the Public Health Department?' " She said, "Yes, I do know what you mean, and you are too concerned about what the community thinks. When your neighbors' children are sick, you don't expect them to come and ask you what your opinion is of the form of the treatment they choose for their children, so why should you care what their opinion is of the form of treatment you choose for your children?"

(R Swan Dep, pp 214-215)

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The quotation from *Science and Health* Mrs. Ahearn cited to Rita Swan on this occasion is as follows:

"To be immortal, we must forsake the mortal sense of things, turn from the lie of false belief to Truth, and gather the facts of being from the divine Mind. The body improves under the same regimen which spiritualizes the thought; and if health is not made manifest under this regimen, this proves that fear is governing the body. This is the law of cause and effect, or like producing like.

* * *

The moral and spiritual facts of health, whispered into thought, produce very direct and marked effects on the body. A physical diagnosis of disease - since mortal mind must be the cause of disease - tends to induce disease.

(*Science and Health*, page 370)

Obviously, Mrs. Ahearn was attempting to turn Rita Swan's thoughts to God and away from mortal things in accordance with Mrs. Eddy's writings, which Mrs. Ahearn specifically cited to Rita Swan.

Doug Swan described the same conversation as follows:

"I did discuss with her at that time that I felt, since we had no idea what was going on, that it might possibly be a reportable disease or communicable disease and we felt that if it were and should be reported—and our daughter had had a disease in Illinois many years earlier that we thought might be measles, we reported it to the health authorities. . . .

(D Swan Dep, p 216)

Q: Did Mrs. Ahearn respond when you discussed that?

A: She did.

Q: What did she say?

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A: She said she was certain that it was not a communicable disease because *the idea of contagion had never come to her* as something to handle during her treatment. She said that we were far too concerned with the opinions of the neighbors.

(D Swan Dep, p. 217) (emphasis added)

Q: Did you believe that Mrs. Ahearn was capable of diagnosing disease?

A: No. . . . I knew she had no training in that.

Q: Was it your understanding of the teachings of Christian Science that practitioners are not supposed to diagnose disease?

A: I was aware of that . . .

(D Swan Dep, p 219)

Again, Doug Swan's testimony is that Mrs. Ahearn stated that the "idea of contagion" had never come to her in the course of her prayers for Matthew Swan is revealing. For Mrs. Ahearn, as for all Christian Science believers, "contagion", like all reality, is an "idea", thought, or aspect of mind that has no physical reality. For this reason, the remark was entirely religious and Doug Swan understood it as such. He knew that the practitioner had no ability to diagnose disease in the medical or physical sense.

Mrs. Ahearn confirms this fact. She testified as follows:

Q: So you are totally unfamiliar with communicable diseases?

A: Absolutely. . . . I really do not know a thing about disease.

(Ahearn Dep, pp 14-15)

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"I am not interested in the study of disease. We pray to heal and Mrs. Eddy tells us in the textbook *Science and Health With Key to the Scriptures* that we look away from disease, we look away from disease in the body to truth and love.

(Ahearn Dep, p 16).

Mrs. Ahearn's testimony emphasizes the religious context in which all of these statements were made.

The relevant deposition testimony and documents are attached hereto as Exhibit D.

3. Even If Diagnoses Amounting To Misrepresentations Were Made, Plaintiffs Had No Right To Rely On Such Misrepresentations And, In Fact, They Did Not Rely On Them.

Even if it is assumed, for purposes of argument, that the practitioners made a medical diagnosis of Matthew's condition, the Swans had no right to rely on such a diagnosis and, in fact, their own statements prove that they did not rely on any alleged diagnoses. As set forth above, the Swans have testified that they were fully aware that the practitioners had no medical knowledge. Indeed, Plaintiffs have taken this position in their trial brief, where they state that:

"Testimony in this trial will show that the *Christian Science practitioners*, sent out by the Boston Church to render treatment to desperately sick children, *have absolutely no purported knowledge regarding illness or disease* and are specifically prohibited from making diagnosis or giving advice". (p. 4) (Emphasis added).

It is also undisputed that both Rita and Douglas Swan each had a two week class in Christian Science healing that was identical to the instruction that the practitioners received. Thus, they knew from that class instruction that the practitioners had no medical learning.

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As a matter of law, a person who knows that another is completely ignorant of medicine has no right to rely on a diagnosis which that other person offers. To hold otherwise would effectively eliminate the reliance requirement.

It is a basic tenet of Michigan law that a party suing for misrepresentation must establish, *inter alia*, (1) that he acted in reliance on the misrepresentation, (2) that he had the right to rely on the misrepresentation, and (3) that the misrepresentation was the proximate cause of his injury. *Dixon v Dixon*, 16 Mich App 42 (1969); *Michael v Jones*, 333 Mich 476 (1952); *Phillips v Smeekens*, 50 Mich App 693 (1973); *Emerick v Saginaw Twp.*, 104 Mich App 243 (1981); *Wheeler v Martin*, 364 Mich 41 (1961); *Schuler v American Motor Sales*, 89 Mich App 276 (1972).

One is not entitled to rely on representations that he knows are without foundation. By their own admission, the Swans knew that practitioners were not competent to render medical diagnoses or to give medical advice. In *Phillips v Smeekens*, 50 Mich App 693, 697 (1973), the Court of Appeals held that the trial court properly dismissed Defendants' counterclaim for misrepresentation of the value of the accounts receivable and accounts payable of a business they purchased from Plaintiff where they had "knowledge of discrepancies in the accounts receivable and payable at the time of the agreement." So too, in the instant case, ought the Swans' misrepresentation claims be dismissed where, as in *Smeekens*, the Swans knew of the glaring discrepancy between the fact that practitioners have no medical training and yet they were supposedly making medical diagnoses.

In *Schuler, supra*, the purchaser of an auto dealership brought suit against the seller who allegedly misrepresented the value of the business premises and the inventory. The plaintiff purchaser claimed, *inter alia*, that the seller had misrepresented the mileage of the cars in inventory. In fact, the seller had given to Plaintiff financial statements and inventory schedules setting forth the true mileage of the cars in inventory. The trial court

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granted the seller's motion for judgment notwithstanding the verdict, holding that notwithstanding alleged misrepresentations of the autos' mileage, Plaintiff had in his possession schedules disclosing their true mileage, and he, therefore, had no right to rely on misrepresentations to the contrary. In so holding, the Court emphasized that:

"There is no fraud where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant." 39 Mich App. at 280.

The Court of Appeals affirmed the trial court's decision, stating:

"[The] plaintiff cannot show a misrepresentation by ignoring a part of the information supplied him and then later claim he was defrauded because he was not told of the facts which he chose to ignore." 39 Mich App, at 279.

Nor can the Swans claim that they were defrauded, because they chose to ignore the fact that practitioners are not competent to give medical diagnoses — a fact they admit there were acutely aware of.

In *Wheeler, supra*, at 44, the court held that the Plaintiff purchaser did not have a right to rely on the defendant seller's representation of the value of land and inventory where plaintiff "examined the premises and the inventory with reference to which the representations were made." So too, in the instant case, the Swans did not have a right to rely on the representations of practitioners regarding medical facts where the Swans, having examined the training and the religious mission of Christian Science practitioners, knew that the practitioners were not competent to make medical diagnoses.

Furthermore, the Swans' testimony demonstrates beyond question that the Swans did not rely on the purported medical diagnoses. For example, in *The Last Strawberry*, in discussing the claim that Matthew might be suffering from roseola, Mrs. Swan wrote:

Memorandum Regarding Diagnosis

"I knew immediately she was wrong, for I had heard about roseola from Kathy's nursery school teacher. If Jeanne had looked up the word in the dictionary or even thought about its meaning, she would have known better. But a Christian Science practitioner is so convinced of her divine mission that any freakish coincidence which passes by may be taken as a message straight from God. Jeanne saw a fever blister less than half the size of a dime and thought it was a rash." (Page 7, emphasis added).

Finally, the notion that the Swans were relying upon medical diagnoses by the practitioners flies in the face of every other fact that has been established with respect to this case. It has been conceded by the Plaintiffs that Christian Science treatment is fundamentally different from medical treatment (*see, e.g.,* page 11 of Plaintiffs' Trial Brief). Plaintiffs have also conceded that they have received medical treatment in the past and that they know the difference between Christian Science treatment and medical treatment. Plaintiffs have also testified and alleged in their pleadings that a medical diagnosis is not part of Christian Science treatment. It is also conceded that the Plaintiffs went to the practitioners for Christian Science treatment. Finally, Plaintiffs do not allege that they wanted or expected medical diagnoses from the practitioners and, as we have already discussed, the Plaintiffs clearly understood that the practitioners were not capable of making medical diagnoses. Therefore, the claim that medical diagnoses by the Defendant practitioners, even if given, were of any consequence in this case, is preposterous.

The Plaintiffs initially did not allege that the practitioners made diagnoses and were liable for that activity because Plaintiffs were looking for medical advice and didn't receive what they were looking for. Instead, Plaintiffs argument was based on the theory that the practitioners violated rules of the Christian Science Church prohibiting diagnoses. Indeed, Plaintiffs Trial Brief continues to sound the same theme. Thus, on page 4 of Plaintiffs' Trial Brief, they state that practitioners are prohibited from

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making diagnoses, but that the practitioners "made prohibited medical diagnoses". This Court has properly ruled that it cannot adjudicate a claim that the practitioners violated the rules and regulations of the Church. Thus, this claim should be stricken on that principle and it should not be permitted to return in a thinly veiled disguise.

4. Even If Misrepresentations Were Made and Relied On, They Were Not the Proximate Cause Of Matthew's Injuries.

If it is assumed that the statements allegedly made by the practitioners are diagnoses constituting actionable misrepresentations and that Defendants relied on them, Plaintiffs' claim nonetheless should be dismissed because these misrepresentations were not the cause of the parents failure to obtain medical aid for Matthew. At the outset, it should be noted that unlike a medical diagnosis by a physician, there is no inherent consequence of a misdiagnosis in the context of Christian Science treatment, since no medication was given to Matthew based on the alleged misdiagnoses and no difference in the treatment that he was afforded occurred because of the misdiagnosis (i.e., he received treatment by prayer whatever the diagnosis). Thus, the only conceivable causal connection between the alleged diagnosis and the injury suffered by Matthew Swan would be that the misrepresentations caused Matthew's parents not to seek medical aid. However, it is clear from the Plaintiffs' own testimony that that was not the case. Matthew Swan's parents continued to follow Christian Science treatment despite Rita Swan's testimony that she knew that what she claim was a medical diagnosis of roseola was wrong. The parents continued to pursue Christian Science treatment even though they knew the practitioners were incapable of giving medical treatment, whatever their diagnosis. In short, the statements under consideration here had no effect on the plaintiffs conduct.

*Memorandum Regarding Diagnosis***5. The Defendants Had No Duty To Avoid Making Incorrect Diagnoses**

There can be no doubt that this lawsuit is about the practice of a religious faith. Both parents were lifelong Christian Scientists. They called each religious practitioner, in turn, and asked for prayer. They admitted in their depositions that they expected that Christian Science prayer would be given for Matthew Swan and that is exactly what they received. Perhaps the most important point is that the parents' own request for prayer defined the relationship that existed between the parties. The parents asked only for prayer, not medical treatment. Therefore, the only duty that arose on the part of the defendants was to provide prayer, not medical treatment.

A few excerpts of the parents' depositions are particularly pertinent in defining the relationship that existed between the parties. For example, the father, Douglas Swan, described the Christian Science treatment given by Jeanne Laitner on the morning of Tuesday, June 21, 1977 in the following terms:

Q: What did she do that morning?

A: The principal thing that she did is to give an oral Christian Science treatment.

Q: Where did she give this treatment?

A: In the living room before my wife and I.

Q: Was Matthew present?

A: No, he was not. . . . I believe he was upstairs. That's my recollection.

Q: And what did she say during the time she gave this Christian Science treatment?

A: I believe the treatment was approximately 20 minutes long and I cannot possibly recall all the points. She basically argued that God is perfect and that man must

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be perfect and that she denied the evidence in the material sense. I believe she pointed out they shouldn't be trusted. She denied that there were any laws of material medicine, *materia medica* is the phrase used in Christian Science, that there were any laws of *materia medica* that were applicable to the case.

* * *

Q: Was this all done in the form of a prayer?

A: As Christian Scientist call it, yes, or Christian Science treatment.

* * *

Q: *After Mrs. Laitner left, did you comment to your wife that that was what you wanted and that's what you believed in?*

A: *I did.* I thought that she had rendered a good treatment. (D Swan Dep, p 162-163) (emphasis added)

* * *

(D Swan Dep, p. 166)

Perhaps the most basic statement by Mr. Swan of the relationship between him and that practitioner was the following:

Q: You sought help from a Christian Science practitioner because you wanted to treat Matthew in Christian Science, is that correct?

A: Yes.

(D Swan Dep, p. 158)

Mr. Swan described his concept of what the practitioner was doing as follows:

"The teachings of Christian Science is that as far as God is concerned, everything is always perfect. You know, he knows nothing about the need of healing. It would be wrong to say that God comes in and heals because he's unaware of

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anything that needs to be healed. It is the understanding of ... the thinking of the patient that needs to be healed, so I really think it's more accurate to say that *the practitioner is bringing about this healing by telling you about God.*"

(D Swan Dep, p. 160)

Similarly, Rita Swan explained her understanding about what one of the practitioners, Mrs. Laitner, was doing when she gave Christian Science treatment.

"I thought she had been doing her metaphysical work and that whatever she had established in her mind as the truths about God and the universe and man and Matthew seemed very clear to her, and that she expected healing to take place, she expected Matthew to be healed."

(R Swan Dep, pp. 75-76)

* * *

Q: What did she do when she gave the treatment aloud?

A: Well, she declared statements about God first and she went through each of the seven synonyms and she would claim Matthew's identification with each one, and she would address Matthew, she would say "God is your life, Matthew, and God is your truth." She was talking to Matthew and then after she had gone through the seven, she declared that there were no false laws of materia medica that would interfere with this treatment, and there was no false parental thought that could interfere with the treatment, and I nodded my head because I wanted to comply with that, and I wanted to be sure that I did not have any false parental thought that got in her way. She also said that he's not a little idea of God, he's a big idea of God, and she said that she would be returning — no, she was talking to Matthew and she said "we" and that she and Matthew were going to do this together. She said "We will be returning to this treatment many times

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today", and there was one other thing about what she said. He's a big idea of God, and I believe, you know, she presented it that Matthew was a perfected spiritual idea and not dependent on me. The other thing I was trying to think of is that she also said "We're not just pouring out hecatombs of gushing theories, this is a Christian Science treatment which must have its effect. The last part may not be a quote, but the first part is. She said that we are not just pouring out hecatombs of gushing theories, and then she made some declaration after that to the effect that the treatment had to be effective.

(R Swan Dep, p 77-78)

There can be no doubt from the above that the parents knew what the practitioners were providing was prayer.

III.

CONCLUSION

In sum, the claim of medical misdiagnoses is a red herring. First and foremost, the statements which Plaintiffs now seek to characterize as diagnoses were not efforts by the practitioners to evaluate medically the disease which afflicted Matthew Swan. Rather, to the extent that the statements were more than questions or responses to statements made by Rita and Douglas Swan, they were merely applications of labels which the practitioners found appropriate to employ in providing Christian Science prayer. Thus, the practitioners would work on a "claim" of paralysis and they sought to deal with the parents' fears about other particular diseases. This is entirely consistent with a reading of Mary Baker Eddy's teachings. What the practitioners said was part and parcel of a religious practice and totally distinct from any medical analysis. Second, to the extent that the Plaintiffs alleged that the statements were intended to convey medical information, Plaintiffs have explicitly testified or stated that they did not believe that the information was medically accurate and thus they

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did not rely on it. In any event, they knew that the practitioners were incapable of giving medical advice and, therefore, they had no basis for reliance. Additionally, even if misdiagnoses were made and Plaintiffs intended to rely on them, they did not cause the harm suffered by Matthew. Finally, no duty was owed to the Plaintiffs other than to provide prayer. That duty was fully discharged.

For these reasons, Defendants respectfully request the Court to enter Summary Judgment with respect to the claims that the practitioners were negligent in misdiagnosing Matthew's ailment and that they misrepresented Matthew's condition.

Respectfully submitted,

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Memorandum Regarding Diagnosis

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Dated: September 7, 1983

Trial Court Order

**STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE**

**ALAN A. MAY, Personal Representative of
the Estate of MATTHEW SWAN, Deceased, and
DOUGLAS SWAN and RITA SWAN, Individually,
*Plaintiffs.***

-VS-

**No. 80 004 605 NI
Hon. Richard C. Kaufman**

**JEANNE LAITNER, JUNE AHEARN, and
THE FIRST CHURCH OF CHRIST, SCIENTIST,
in Boston, Massachusetts, a foreign
corporation, Jointly and Severally,
*Defendants.***

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**ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT UNDER GCR 117.2(3)**

**At a session of said Court held in the City of Detroit,
County of Wayne, State of Michigan, on September 7,
1983.**

*Trial Court Order***PRESENT: HONORABLE RICHARD C. KAUFMAN***Circuit Court Judge*

This matter having come before this Court for hearing, and after hearing the arguments of counsel for the respective parties and having read the Motion and Briefs with respect thereto and the Court being otherwise fully advised in the premises and the Court having determined that the Motion of Defendants for Summary Judgment Under GCR 117.2(3) should be granted for reasons stated by the Court on the record:

NOW, THEREFORE, it is hereby ordered and adjudged as follows:

The Motion of Defendants JEANNE LAITNER, JUNE AHEARN and THE FIRST CHURCH OF CHRIST, SCIENTIST for Summary Judgment be, and hereby is, granted, and that each and every one of the allegations of Plaintiffs as set forth in the document entitled Allegations of Negligence and Misrepresentation filed by the Plaintiffs and attached hereto and incorporated herein (which contains the allegations made by Plaintiffs in their Complaint and otherwise) be, and hereby are, stricken.

RICHARD C. KAUFMAN*Circuit Court Judge*

Dated: September 7, 1983

A TRUE COPY**JAMES R. KILLEEN****CLERK****BY M. VANE**

Trial Court Order

**STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE**

**ALAN A. MAY, Personal Representative of
the Estate of MATTHEW SWAN, Deceased, and
DOUGLAS SWAN and RITA SWAN, Individually,
*Plaintiffs.***

-vs-

**No. 80 004 605 NI
Hon. Richard C. Kaufman**

**JEANNE LAITNER, JUNE AHEARN, and
THE FIRST CHURCH OF CHRIST, SCIENTIST,
in Boston, Massachusetts, a foreign
corporation, Jointly and Severally,
*Defendants.***

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**ALLEGATIONS OF
NEGLIGENCE AND MISREPRESENTATION**

**NOW COME the Plaintiffs, by and through their Attorneys,
CHARFOOS, CHRISTENSEN, GILBERT & ARCHER,
P.C., and offers the Court's list with supplements by Plaintiffs as**

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to allegations of negligence and misrepresentation. Which list will describe the allegations of wrongdoing in this case.

I. ALLEGATIONS OF NEGLIGENCE AS TO INDIVIDUAL DEFENDANTS

1. In failing to frequently visit Matthew.
2. In failing to consult a doctor, or report Matthew's condition to health officials.
3. In making inaccurate diagnoses.
4. In coercing parents not to get medicine.

II. NEGLIGENCE AGAINST THE CHURCH

1. Through application of agency law, actual or apparent.
2. Direct allegations of negligence against the church.
 - a. In failing to sufficiently train and educate practitioners and nurses in the treatment of small children.
 - b. In failing to instruct practitioners in the rudiments of communicable/notifiable disease so that reporting obligation could be carried out.
 - c. In failing to adequately monitor and supervise activities of the practitioners and nurses in their treatment of small children.
 - d. In failing in their duty to operate a healing system in such a way as to not cause damage to minor children.

III. MISREPRESENTATION; CLAIMS OF MISREPRESENTATION AGAINST INDIVIDUAL DEFENDANTS

1. That medical treatment would offer no solution to Matthew's health problem.
2. That in making statements, inaccurate statements of specific diagnosis.

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3. Statements that medical diagnosis will induce the disease.
4. Statements to the effect that Matthew's condition was being healed.
5. Statements that Matthew's health was improving and progressing.

IV. MISREPRESENTATION; CLAIMS AGAINST DEFENDANT-CHURCH

1. By application of agency, either actual or apparent.
2. Direct claims of misrepresentation against Mother Church.
 - a. Representation that the practitioner could determine when a child was not progressing.
 - b. Representation that the practitioner could determine when the child had communicable/notifiable disease.
 - c. Representation that there were appropriately trained and educated nurses.
 - d. Representations to plaintiffs and the community-at-large that the treatment through their practitioners provides healing of physical ailments.

**CHARFOOS, CHRISTENSEN,
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Dated: September 6, 1983

*Excerpts From Petitioner's Brief
To The Michigan Court Of Appeals*

STATEMENT OF ISSUE INVOLVED

**WHEN *RELIGIOUS* CONDUCT PROXIMATELY
CAUSES THE INJURY OR DEATH OF AN INFANT,
IS THE STATE'S *PARENS PATRIAE* INTEREST IN
CHILDREN'S WELFARE SUFFICIENTLY COMPEL-
LING TO PERMIT A COMMON LAW ACTION IN
ORDINARY NEGLIGENCE?**

Plaintiff-appellant answers "Yes."

Defendants-appellees answer "No."

The Trial Court did not address this issue.

*Excerpts From Petitioner's Brief
To The Michigan Court Of Appeals*

ARGUMENT

THE STATE'S WELL-ESTABLISHED *PARENS PATRIAE* INTEREST IN THE HEALTH AND SAFETY OF ITS CHILDREN IS SUFFICIENTLY COMPELLING TO PERMIT A COMMON LAW NEGLIGENCE ACTION TO BE BROUGHT AGAINST CHRISTIAN SCIENCE FAITH HEALERS WHOSE RELIGIOUS CONDUCT PROXIMATELY CAUSED THE INJURY OR DEATH OF AN INFANT.

There is an ancient tradition that the state must intercede to protect those who cannot protect themselves. It may intervene where adult religious belief translates into conduct which jeopardizes a child's health. In such cases, a sufficiently compelling state interest justifies the suppression of the practice. *Prince v Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944).

The case at bar presents a question of first impression in the United States. The facts surrounding the death of Matthew Swan require the court to weigh the state's acknowledged and unquestioned interest in the health and welfare of children against interference with religious free exercise, for this case does not simply present a question of avoiding secular schools³⁰ or eschewing medical examinations.³¹ This case addresses the issue of martyring children in the name of religion and what can be done about it. Though remaining committed to the widest possible toleration of religious liberty as to adults, on behalf of Matthew Swan and babies like him, plaintiff insists that this freedom takes second place to the even more basic proposition that a child has the right to live.

³⁰ *Wisconsin v Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed2d 15 (1972).

³¹ See, e.g., MCL 722.127; MSA 25.358 (27).